Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

FARMERS INSURANCE EXCHANGE,

Petitioner,

vs.

ROSE M. BELL, LOREN D. MITCHELL, RACHEL POESCHEL, WYNN ANDERSON AND JOSEPH C. KOKAISL, individually and on behalf of others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, First Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under federal regulations, adopted by California law, thousands of American businesses employing millions of workers need not pay extra for overtime work by administrative employees. This exemption does not, however, apply to "production" workers. The California Court of Appeal, interpreting the federal regulations, held that the plaintiffs, who are insurance adjusters, are production workers entitled to overtime pay because they work in branch offices whose product is claims adjusting. The state court decision is in conflict with federal regulatory and decisional law. The questions presented are:

1. Whether courts should consider the nature of an employer's business as a whole, rather than the character of the internal department where employees work, in deciding whether the employees are production workers entitled to overtime pay.

2. Whether courts should treat routine duties associated with exempt functions as being exempt functions in determining whether overtime must be paid.

LIST OF PARTIES

The parties to the proceeding below are the petitioner-defendant Farmers Insurance Exchange and the respondents-plaintiffs Rose M. Bell, Loren D. Mitchell, Rachel Poeschel, Wynn Anderson and Joseph C. Kokaisl, individually and on behalf of others similarly situated.

CORPORATE DISCLOSURE STATEMENT

Farmers Insurance Exchange is a reciprocal or inter-insurance exchange. It is not a corporation and does not issue stock.

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PETITION FOR A WRIT OF CERTIORARI

Defendant Farmers Insurance Exchange respectfully petitions for a writ of certiorari to review the decision of the California Court of Appeal, First Appellate District, filed in the above-entitled proceeding on March 5, 2001 (of which the California Supreme Court denied review on June 20, 2001), finding that the plaintiffs are entitled to payment for overtime work.

OPINION BELOW

The opinion of the California Court of Appeal is reported at 105 Cal. Rptr. 2d 59 (2001) and is reproduced in the Appendix (App.) filed herewith. (App. 1-46.) The order of the California Court of Appeal denying a rehearing (App. 47), the order of the California Supreme Court denying review (App. 48), and the order of the Alameda County Superior Court determining liability (App. 49-55) are unreported and are reproduced in the Appendix filed herewith.

STATEMENT OF JURISDICTION

The California Court of Appeal entered its judgment on March 5, 2001. That court denied a timely petition for rehearing on March 29, 2001. The California Supreme Court denied a petition for review (with two justices voting to grant review) on June 20, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(a) (West 1993).

STATUTES AND REGULATIONS INVOLVED

This petition for a writ of certiorari involves (1) the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C.A. § 201-206 (West 1993); (2) federal regulations promulgated under the FLSA, including 29 C.F.R. § 541.2, 541.108(a), 541.202(a) & (c), 541.205(a), (b) & (c), and 541.207(e) (1998) (App. 56-80); and portions of a regulation of the California Industrial Welfare Commission entitled Wage Order No. 4-2001 (App. 81-95).

STATEMENT OF THE CASE

Farmers Insurance Exchange (hereinafter FIE) employs thousands of adjusters who perform duties pertaining to negotiation and settlement of claims. FIE treats these adjusters as administrative employees who are exempt from federal and state regulations requiring payment for overtime work. The benefit to the adjusters is that they do not have to punch a clock, but can tailor their work schedules to fit their personal and family needs. They can take time off whenever they want and for whatever reason during the course of a business day.

In this state court class action lawsuit, plaintiffs sought multiple awards of overtime pay for some 2,000 past and present FIE claims adjusters in California. The trial judge summarily determined FIE's liability, granting

summary adjudication of liability for overtime pay to all of FIE's California adjusters. (App. 50-51.) Thereafter, the judge awarded plaintiffs interim attorney's fees based on the liability order. FIE appealed the attorney's fees award, arguing that the underlying liability order was erroneous.

The pivotal liability issue is whether FIE's adjusters are administrative employees who are exempt from state overtime payment requirements. Until 2000, the state regulation on administrative exemption – commonly known as Wage Order 4 – required the presence of the following factors for the state exemption to apply: the employees' work must be primarily intellectual, managerial or creative; their work must require exercise of discretion and independent judgment; and their pay must exceed a specified sum. Former Cal. Code Regs., tit. 8, § 11040(1)(A)(1).

The federal regulations on administrative exemption from overtime payment requirements state additionally that, for the exemption to apply, the employees' work must be "directly related to management policies or general business operations," 29 C.F.R. § 541.2(a)(1) (1998) (App. 56) – meaning that so-called "production" workers are excluded from the exemption and thus are entitled to overtime pay. *See* 29 C.F.R. § 541.205(a) (1998). (App. 66.) Effective October 1, 2000, California's Wage Order 4 was amended so that it expressly prescribes the production worker exclusion as set forth in the federal regulations. (App. 83.)

The present litigation began under the pre-2000 version of Wage Order 4, which plaintiffs contended should be construed as implicitly containing the federal production worker exclusion. Plaintiffs further contended they

are production workers and thus are excluded from California's administrative exemption – that is, they are entitled to overtime pay. The trial judge agreed with plaintiffs on both points and, applying the federal production worker exclusion, granted summary adjudication. (App. 51-54.)

On March 5, 2001, the California Court of Appeal reversed the order awarding attorney's fees, holding that plaintiffs' interim attorney's fees are not statutorily recoverable. The court also reviewed the summary adjudication of FIE's liability and determined "that the trial court properly ruled, as a matter of law, that the plaintiffs were not employed in 'administrative capacities.' " 105 Cal. Rptr. 2d at 76. (App. 37.) In making the latter determination, the court said the federal regulations "are relevant to interpretation" of the state administrative exemption and should be looked to "for guidance." *Id.* at 67. (App. 16.) The court then relied on the production worker exclusion as prescribed by the federal regulations to conclude that plaintiffs are production workers entitled to overtime pay. *Id.* at 70, 74. (App. 22-23, 32-33.)

On March 29, 2001, the Court of Appeal denied a petition for rehearing as to the liability determination. (App. 47.) On June 20, 2001, the California Supreme Court denied a petition for review which had raised the federal questions presented in this petition for a writ of certiorari. (App. 48.)

The trial of damages in this case proceeded while the liability issues were being litigated on appeal. On July 11,

2001, a jury rendered a verdict against FIE in the sum of $90 million.

REASONS FOR GRANTING THE PETITION

I. MILLIONS OF AMERICAN WORKERS ARE AFFECTED BY THE STATE COURT DECISION.

This case significantly affects a large percentage of California's 16 million employees and has been closely watched by corporate and individual employers throughout the United States. Between 20 and 27 percent of American workers are classified as exempt from regulations requiring payment for overtime work. U.S. Gen. Accounting Office, Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place 2, 8 (1999). The present state court decision casts doubt on every one of those exemptions for administrative employees – particularly in California, where the chair of the California Industrial Welfare Commission observed that "[i]f this decision stands, I don't know how anybody can be exempt in the state of California." Lisa Girion, *More Overtime Lawsuits Expected,* L.A. Times, July 12, 2001, at C1. The effect of the decision will be to add dramatically to a current explosion of class action litigation nationwide.

Overtime pay litigation is currently proliferating throughout a multitude of industries. Business Week magazine recently observed:

> The allegations are coming from all kinds of white-collar workers, including retail managers, reporters, pharmacists, sales reps, personal

> bankers, engineers, computer programmers, claims adjusters, and even lawyers.
>
> . . . Companies such as U-Haul, Taco Bell, Pepsi-Cola, AutoZone, Borders Books, Pacific Bell, Bridgestone/Firestone, and Wal-Mart, to name a few, have all been slapped with overtime suits.

Michelle Conlin, *Revenge of the "Managers,"* Business Week, March 12, 2001, at 60. Said one San Francisco lawyer: "It's exploding." *Id.*

The primary purpose of the wage and hour laws as promulgated in the 1930s and 1940s was to protect blue collar workers in a manufacturing economy. Today, in the new service economy, some white collar workers are more like blue collar workers of the past and ought to be viewed as such for purposes of receiving overtime pay. But many others still occupy administrative, executive and professional roles that Congress has decided should make them exempt from extra payment for overtime work. This Court's guidance is needed to help employers distinguish between these two classes of workers in today's economy.

II. FEDERAL QUESTIONS ARE PRESENTED BY THE STATE COURT'S INTERPRETATION OF FEDERAL REGULATIONS ON ENTITLEMENT TO OVERTIME PAY.

California's Wage Order 4, as amended in 2000, incorporates specified federal regulations on the administrative exemption from entitlement to overtime pay, including the production worker exclusion. Wage Order 4 states:

> The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215.

Cal. Indus. Welf. Com., Wage Order No. 4-2001 (2001), § 1(A)(2)(f). (App. 84.)

Because the federal regulations are incorporated into Wage Order 4, this Court "may pass on the federal question that has been incorporated in the state law, and then remand the case to the state court for reconsideration of its interpretation of the state law in light of the Supreme Court's interpretation of the underlying federal law." Robert L. Stern, et al., Supreme Court Practice 145 (7th ed. 1993). "[T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law. . . . If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984).

III. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT BETWEEN THE STATE COURT DECISION AND FEDERAL DECISIONS, AND WITHIN THE FEDERAL DECISIONS, CONCERNING WHETHER AN EMPLOYEE IS A "PRODUCTION WORKER" ENTITLED TO OVERTIME PAY.

At the heart of this case is a federal regulatory provision – promulgated under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C.A. § 201-206 (West 1993), and applied in proceedings under California state law – that "production" workers are entitled to overtime pay. The California Court of Appeal, interpreting the federal law, decided that the insurance adjusters here are production workers because they work in branch offices whose "product" is claims adjusting. 105 Cal. Rptr. 2d at 73. (App. 31-32.)

The Court of Appeal did not consider the nature of FIE's business as a whole, but rather the company department where the employees work. The court focused on only one aspect of FIE's business – claims adjusting – and decided that FIE's adjusters are production workers because they work in some 70 branch claims offices where claims are adjusted for FIE and other affiliated companies. According to the court, "we are concerned *only* with the business function of the *branch claims offices* in California where the plaintiffs worked," and plaintiffs are production workers because "claims adjusting is the sole mission of the 70 *branch claims offices* where the plaintiffs worked" and plaintiffs "are fully engaged in performing the day-to-day activities of that *important*

component of the business." 105 Cal. Rptr. 2d at 73-74 (emphasis added). (App. 31-32.)

Thus, according to the state court, in interpreting the federal production worker test, plaintiffs' status as exempt or non-exempt employees is to be determined by reference to the department where they work within the company.

The prescribed focus of the federal production worker test, however, is not so narrow. The focus is not on how employees are departmentalized within the company, but is, more broadly, on whether an employee's work is "directly related to management policies or *general business operations* of his employer or his employer's customers." 29 C.F.R. § 541.2(a)(1) (1998) (emphasis added) (App. 56); *accord* Cal. Indus. Welf. Com., Wage Order No. 4-2001 (2001), § 1(A)(2)(a)(i) (App. 83). The focus on general business operations implicates the nature of the *business as a whole*, not just the department where the employees work – meaning, in the present case, that the focus is on the business of *insurance*, not just the component of claims adjusting.

FIE's business is insurance – that is, selling insurance policies, collecting insurance premiums, investing those premiums, and adjusting claims made on the policies. FIE is licensed, regulated and taxed as an insurance company and has more than ten million policyholders. Thus, in the present context, the focus of the production worker test is on FIE's insurance business, not just claims adjusting.

During the pendency of FIE's petition for review by the California Supreme Court, the Ninth Circuit Court of Appeals issued a decision – *Webster v. Public School*

Employees of Washington, Inc., 247 F.3d 910 (9th Cir. 2001) – which is in direct conflict with the state court's decision regarding the production worker issue. FIE advised the California Supreme Court of this conflict before the court ruled on the petition for review.

Webster involved a labor union employee, Jay Webster, who negotiated collective bargaining agreements for "bargaining units" composed of local school district employees. 247 F.3d at 911. The union divided the state of Washington into "zones," each of which contained a bargaining unit which was a self-governing entity formed pursuant to the union's bylaws. *Id.* at 912. Webster contended he performed "production work," and thus was not exempt from overtime-payment requirements, because "the primary service goal of the bargaining units is to secure collective bargaining agreements" and Webster's primary duty "is to negotiate the agreements." *Id.* at 915. This argument is virtually identical to the state court's reasoning in the present case that the plaintiffs are production workers because they work in branch claims offices where "claims adjusting is the sole mission" and plaintiffs are "fully engaged in performing the day-to-day activities of that important component of the business." 105 Cal. Rptr. 2d at 74. (App. 32.)

The *Webster* opinion rejects such reasoning because it would improperly eliminate the administrative exemption for every employee of a departmentalized company. *Webster* explains:

> If we were to accept Webster's position and view the negotiation of agreements as the bargaining units' production, then any work – including that of a president or CEO – for a legal

> entity that addresses primarily management or administrative concerns, such as a corporate holding company, would be production. This would defeat the purpose of the administrative exemption.
>
> . . . Webster's proposed application of the [administrative work/production] dichotomy is not supportable because, by describing bargaining units solely as units of production, it would render the distinction between administrative work and production meaningless."

247 F.3d at 916.

Thus, *Webster* makes the focus of the production worker test the nature of the employer's business as a whole, not where the employees work in a departmentalized company – which is essential to maintain the federally-prescribed distinction between administrative work and production work.

Most prior case law is in accord with *Webster*. For example, in *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997), which involved an insurance company's marketing representatives, the court said that the "products" generated by the insurer were *insurance policies*, and thus the marketing representatives were not production workers because they were "in no way involved in the design or generation of insurance policies, the very product 'that the enterprise exists to produce and market. . . . ' " *Id.* at p. 9, quoting *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990); *accord Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 903 (3d Cir. 1991) (focusing on " 'the nature of the employer's business' "); *see also Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 540 (7th Cir.

1999); *Shaw v. Prentice Hall Computer Publ'g*, 151 F.3d 640, 644 (7th Cir. 1998); *Haywood v. North American Van Lines, Inc.*, 121 F.3d 1066, 1072 (7th Cir. 1997); *Cooke v. General Dynamics Corp.*, 993 F. Supp. 56, 61-62 (D. Conn. 1993).

There is a conflicting view, set forth in *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990), which said probation officers who advised the court on sentencing and disposition performed the probation department's day-to-day activities rather than providing "advice on the proper way to conduct the business of the court" and therefore were production workers. *See also Reich v. New York*, 3 F.3d 581, 587-588 (2d Cir. 1993); *Harris v. District of Columbia*, 741 F. Supp. 254, 262-263 (D.D.C. 1990). Thus, there is conflict even within the federal circuit and district courts, which is exacerbated by the state court's decision here.

Webster and its precursors, however, state the better view. The reasoning of *Webster* is firmly grounded in common sense. If exemption status were determined narrowly by reference to the department where an employee works, then every company with a departmentalized work force – i.e., most large companies – would inevitably be found to employ only production workers, because the sole purpose of any employee within a company department is to perform the day-to-day activities of that department. For example, a senior financial analyst employed in the finance department of General Motors would be considered a production worker because the product of the finance department is financial analysis, even though the company's real product is automobiles. Such an approach, as a practical matter, would eliminate the administrative exemption entirely, making every

employee of a departmentalized company a production worker entitled to overtime pay. This is surely not the intended result of the federal production worker test, and it is surely the wrong result if the administrative exemption is to have any practical application.

The reasoning in *Webster* is squarely at odds with the state court's reasoning in the present case concerning the determination whether an employee is a production worker entitled to overtime pay. The decisional conflict should be resolved by this Court.

IV. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT BETWEEN FEDERAL REGULATIONS AND THE STATE COURT DECISION CONCERNING TREATMENT OF ROUTINE DUTIES IN DETERMINING EXEMPTION FROM OVERTIME PAY.

The second question presented in this petition concerns a federal regulatory provision, adopted for proceedings under California state law, that governs the treatment of routine duties associated with exempt functions in determining whether overtime must be paid.

The California state overtime exemption for administrative employees prescribes a requirement that the employee must be "primarily engaged" in exempt work. Cal. Indus. Welf. Com., Wage Order No. 4-2001 (2001), § 1(A)(2)(f) (App. 84); *see* former Cal. Code Regs., tit. 8, § 11040(1)(A)(1). The term "primarily" is defined as more than one-half of the employee's work time. Cal. Indus. Welf. Com., Wage Order No. 4-2001 (2001), § 2(N) (App. 93); *see* former Cal. Code Regs., tit. 8, § 11040(2)(K); *see*

also Ramirez v. Yosemite Water Co., 85 Cal. Rptr. 2d 844, 852 n.4 (1999).

Under the federal law of overtime exemption, exempt work includes "routine work which is directly and closely related to the performance of" work that meets the test of exemption. 29 C.F.R. § 541.202(a) (1998). (App. 64.) Thus, exempt work includes

> a variety of routine tasks which may not be essential to the proper performance of the more important duties but which are *functionally related* to them *directly and closely*. In this latter category are activities which an administrative employee may reasonably be expected to perform in connection with carrying out his administrative functions including duties which either *facilitate or arise incidentally* from the performance of such functions and are commonly performed in connection with them.

Id. § 541.202(c) (1998) (emphasis added). (App. 65.) This *functionally related* test is met by "activities which are closely *associated with* the performance of" exempt functions, 29 C.F.R. § 541.108(a) (1998) (emphasis added) (App. 59) – that is, the legwork that inevitably accompanies administrative tasks. The 2000 amendment to California's Wage Order 4 expressly embraces this aspect of federal law, stating that exempt work includes "all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions." Cal. Indus. Welf. Com., Wage Order No. 4-2001 (2001), § 1(A)(2)(f). (App. 84.)

Thus, in deciding whether more than one-half of an employee's work time is spent primarily engaged in

exempt work – so that the employee is exempt from California's overtime payment requirements – federal law is critical to the decision, and routine work is counted as exempt work if it is associated with the performance of exempt functions.

Such exempt functions include "work of *substantial importance* to the management or operation of the business," 29 C.F.R. § 541.205(a) (1998) (emphasis added) (App. 66), such as "advising the management." *Id.* § 541.205(b). (App. 67.) It is undisputed that FIE's claims representatives perform such work of substantial importance, in that they make recommendations to their supervisors on matters such as whether a claim should be covered, how much money should be placed in reserve for a claim, and whether a claim should be settled in a specific amount.[1]

Thus, under federal law as followed in California state courts, plaintiffs' recommendations on coverage, reserves and settlement, *along with associated routine duties*, are counted as exempt functions for purposes of determining entitlement to overtime pay. Every administrative recommendation requires routine legwork such as

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[1] The federal regulation describing another prong of the test of exemption – whether the employee exercises discretion and independent judgment – similarly states that "[f]inal decisions [are] not necessary" and it is enough that an employee makes "*recommendations for action* rather than the actual taking of action," and there is no exclusion from exemption merely because "an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review. . . . " 29 C.F.R. § 541.207(e) (1998) (emphasis added). (App. 78.)

site visits, damage assessment, file maintenance and other office tasks. These routine duties of plaintiffs are indisputably associated with their advisory duties: plaintiffs conceded in the trial court that their recommendations for action are an integral part of the claims-handling function.

The state court opinion acknowledges the undisputed evidence that plaintiffs make recommendations for action. 105 Cal. Rptr. 2d at 73. (App. 31-32.) The opinion concludes, however, that these duties "are all associated in some manner" with routine exempt functions and "involve intermittent and incidental tasks that involve a small part of the claims representatives' time. . . . " *Id.* at 73-74. (App. 32.) In other words, according to the state court, routine work that is associated with the performance of exempt functions is to be treated as *non*-exempt – precisely the opposite of the rule prescribed by the federal regulation which is followed in California.

Plaintiffs argued below that their recommendations on coverage, reserves and settlement concerned only routine production matters. Not even the state court agreed with that meritless assertion: the court called coverage, reserves and settlement "matters of *relatively greater importance.*" *Id.* at 75 (emphasis added). (App. 36.) Production work does not include "work of *substantial importance* to the management or operation of the business." 29 C.F.R. § 541.205(a) (1998) (emphasis added). (App. 66.) Insurance adjusters perform such work of substantial importance, which is why the federal regulations expressly include "claim agents and adjusters" in an exemplary list of employees who are not production workers. *Id.* § 541.205(c)(5). (App. 69.)

Thus, if it is true, as the state court said, that "the bulk of [plaintiffs'] time" is spent on routine work that is associated with exempt functions, 105 Cal. Rptr. 2d at 74 (App. 32), then plaintiffs are not production workers.

In short, the state court stood the federal rule on its head. According to the federal law adopted in California, routine duties that are associated with exempt functions are to be treated as *exempt* for purposes of determining whether more than one-half of an employee's work time is spent primarily engaged in exempt work. According to the state court's opinion – and contrary to federal regulatory law – such routine duties are to be treated as *non*-exempt.

Intervention by this Court is needed to resolve this conflict between federal regulatory law and state court case law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[No. A091134, First Dist., Div. One. Mar. 5, 2001.]

ROSE M. BELL et al., Plaintiffs and Respondents, v.

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OPINION

SWAGER, J. – In this class action lawsuit to recover for nonpayment of overtime compensation, the defendant, Farmers Insurance Exchange (hereafter FIE), appeals an interim order awarding attorney fees, which was entered following an order granting summary adjudication in favor of plaintiffs on defendant's fourth affirmative defense. We find no error in the decisional underpinning of the award but reverse it on statutory grounds.

PROCEDURAL BACKGROUND

FIE is one of a group of affiliated insurance companies doing business under the service name of Farmers Insurance Group of Companies. The "Personal Lines Division" of the company issues automobile insurance

policies and homeowner policies to private individuals in California. Claims arising in California from these policies, as well as from similar policies issued by other affiliated companies, are normally processed by claims representatives working in some 70 branch claims offices in the state. Employees in these branch claims offices, including clerical and supervisory employees as well as claims representatives, constitute the majority of FIE's workforce in California. Though claims representatives regularly work over 40 hours a week, FIE does not pay overtime on the ground that these employees are exempt from the wage and hour laws.

Plaintiffs are former and current FIE claims representatives who worked in the California branch claims offices of the "Personal Lines Division" from October 1, 1993, to the present. They brought this class action on behalf of themselves and other California claims representatives, seeking damages for unpaid overtime compensation and other relief. Accepting their request for class certification, the trial court certified three subclasses of employees who worked for FIE during the relevant period and were assigned to handle property, automobile physical damage and liability claims.

Following completion of discovery, plaintiffs filed a motion for summary adjudication of FIE's fourth affirmative defense to the first amended complaint. That motion sought a ruling on the plaintiffs' exempt status under California wage and hour law. In an order entered April 21, 1999, the trial court granted the motion for summary adjudication, which it described as presenting the issue whether personal lines claims representatives are "administrators" exempt from overtime pay. The court

found: "that there is no triable controversy and that claims adjusting is a product or service which FIE's operation exists to provide. It is further found that the Personal Lines Claims Representatives devote their time to carrying out FIE's claims adjusting product/service as opposed to its 'administrative' functions. Therefore, as a matter of law, these Personal Lines Claims representatives . . . do not fall within the ambit of the 'administrative' exemption from overtime. . . . "

Plaintiffs subsequently moved for an interim award of attorney fees and costs pursuant to Labor Code sections 218.5 and 1194, subdivision (a). Granting plaintiffs' motion, the trial court awarded interim attorney fees of $1,238,116.50, finding that the plaintiffs "prevailed on liability issues." FIE now appeals from the order awarding attorney fees as a collateral final order (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 369, [134 Cal.Rptr. 197, 556 P.2d 297]) and asks us to review the summary adjudication order pursuant to Code of Civil Procedure section 906.

Discussion

A. *Administrative Employee Exemption*

FIE first attacks the interim order awarding attorney fees on the ground that its decisional underpinning – the order of summary adjudication on its fourth affirmative defense – was erroneous. The affirmative defense was predicated on the claim that plaintiffs come within an exemption from the overtime compensation requirements of the Industrial Welfare Commission (IWC) applying to "persons employed in administrative . . . capacities." As

applied to the insurance industry, the pertinent exemption appears in subdivision 1(A) of the IWC's wage order No. 4, codified in California Code of Regulations,[1] title 8, section 11040, subdivision 1(A). We will first consider issues relating to the statutory context of subdivision 1(A) and then examine the relevance of federal law in its interpretation.

1. *Statutory Context of term "Administrative Capacities"*

The IWC has promulgated 15 wage orders, applying to separate industries, which each follow a similar format. Wage order No. 4 applies broadly to "Professional, Technical, Clerical, Mechanical, and Similar Occupations." As in the case of other wage orders, subdivision 1 of CCR, title 8, section 11040, addresses the coverage of the wage order and sets forth the exemption at issue here in subdivision 1(A):

"1. Applicability of Order. This Order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis, unless such occupation is performed in an industry covered by an industry order of this Commission, except that:

"(A) Provisions of sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered

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[1] Hereafter CCR.

to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

"(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $1150.00 per month; or

"(2) The employee is licensed or certified by the State of California and is engaged in [the practice of a profession such as law or medicine]."

We begin by noting that wage order No. 4 is a quasi-legislative regulation subject to normal principles of statutory interpretation. It was promulgated by the IWC under the authority of 1913 legislation directing it to provide for a "minimum wage" for women and children. (Stats. 1913, ch. 324, § 6, pp. 632-635; Cal. Const., former art. XX, § 17 – 1/2.) In the early 1970's, the federal courts invalidated a substantial portion of IWC regulations on the ground that the limited application to adult women workers violated the prohibition on sex discrimination in title VII of the federal Civil Rights Act of 1964.[2] In response, the Legislature enacted new enabling legislation in 1973. (See Lab. Code §§ 1173 and 1178.) The constitutionality of this legislation was confirmed by enactment of California Constitution, article XIV, section 1. Our high court observed that "the 1973 legislation did not alter the basic nature of the IWC's decision-making

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[2] See *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 700-701 [166 Cal.Rptr. 331, 613 P.2d 579].

authority. . . . " (*Industrial Welfare Com. v. Superior Court, supra,* 27 Cal.3d at p. 701.) In particular, "[j]udicial authorities have repeatedly emphasized that in fulfilling its broad statutory mandate, the IWC engages in a quasi-legislative endeavor, a task which necessarily and properly requires the commission's exercise of a considerable degree of policy-making judgment and discretion." (*Id.* at p. 702.)

FIE maintains that our analysis of the administrative exemption should be governed by the rule that, " '[i]f statutory language is "clear and unambiguous there is no need for construction, and courts should not indulge in it." [Citation.]' [Citation.]" (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 131-132, [70 Cal.Rptr.2d 304, 949 P.2d 1].) In its view, the scope of the administrative exemption in CCR, title 8, section 11040, subdivision 1(A) is clearly and comprehensively defined in subparts (1) and (2). Only subpart (1) applies to the present case. Focusing on the word "unless" in subdivision 1(A), FIE argues that the interpretation of subpart (1) is governed by the principle of *expressio unius est exclusio alterius.* (See *People v. Anzalone* (1999) 19 Cal.4th 1074, 1078, [81 Cal.Rptr.2d 315, 969 P.2d 160].) Under this principle of statutory interpretation, it reasons that, if the conditions of subpart (1) are necessary conditions to subdivision 1(A) (as the word "unless" implies), it may be inferred that they are the only conditions to the exemption. We disagree.

The substantive import of CCR, title 8, section 11040, subdivision 1(A)(I) does not suggest that it is intended to provide the sole criteria for determining if an employee is in an administrative, executive, or professional capacity.

The very brief description of duties ["primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment"] and the standard of remuneration ["not less than $1150.00 per month"] cannot reasonably be considered to be an adequate definition of the phrase "administrative, executive, or professional capacities." But they do make sense as establishing particular limitations on the scope of the phrase. Thus, the standard of remuneration does not contribute meaningfully to a definition of "administrative, executive, or professional capacities," but does serve as an outside parameter; an employee earning less than this amount, despite whatever other job duties he/she may have, will not qualify as an exempt employee. Also, the terms "intellectual, managerial, or creative" lack any direct defining relationship to the phrase "administrative, executive, or professional capacities," or any particular term in the phrase, but a job lacking any of these characteristics will fall outside the scope of the phrase.

In our view, it is more reasonable to give the term "administrative capacity" in CCR, title 8, section 11040, subdivision 1(A) an independent meaning, defining the breadth of the exemption in conjunction with the criteria of subparts (1) and (2) of the subdivision. This interpretation is favored by authority holding that, "under California law, exemptions from statutory mandatory overtime provisions are narrowly construed." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2]; *Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562 [38 Cal.Rptr.2d 221].) Such a narrow construction would give effect to any limitations implied by the term "administrative capacity" in

subdivision 1(A) in addition to those limitations imposed by subparts (1) and (2) of the subdivision.

This reading is most consistent with the principle that, " ' "[i]n analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose. . . . " ' [Citation.]" (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 775 [72 Cal.Rptr.2d 624, 952 P.2d 641]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118 [81 Cal.Rptr.2d 471, 969 P.2d 564].)

The principle of giving meaning to every word in the statute acquires a compelling logic in the present case because the reference to "administrative, executive, or professional capacities" in CCR, title 8, section 11040, subdivision 1(A) was added to wage order No. 4 *after* the provisions of subpart (1) of the subdivision. As we will explain in our examination of the regulatory history, the conditions in subpart (1) may be traced to a 1947 amendment, but the first sentence in subdivision (1)(A) adding the reference to "women employed in administrative, executive, or professional capacities" was added in a 1957 amendment.[3] Whatever may have been the legislative intent behind the 1957 amendment, it is clear that the IWC assigned significance to the terms "administrative, executive, or professional capacities." The legislative history does not permit us to adopt an interpretation of the exemption that effectively reduces these terms to surplusage. (*Grupe Development Co. v. Superior Court* (1993) 4

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[3] See pages 812-814, *post.*

Cal.4th 911, 921 [16 Cal.Rptr.2d 226, 844 P.2d 545]; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323].)

These principles of interpretation persuade us that we may properly inquire whether, and in what manner, the scope of the exemption is affected by the meaning of the term "administrative capacity."[4]

2. *Relevance of Federal Law*

Having concluded that the principles of statutory interpretation allow us to give the term "administrative" in CCR, title 8, section 11040, subdivision 1(A) a meaning independent of the limitations of subparts (1) and (2) of the subdivision, we turn next to the relevance of federal law in construing the term. The question, we think, may be best approached by first reviewing the evolution of wage order No. 4 and its federal counterparts.

Prior to 1947, the IWC wage orders, including wage order No. 4, contained no exemption from overtime

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[4] We reject FIE's suggestion that the meaning of this term may be found in the language of CCR, title 8, § 11040, subdivision 1 referring to "professional, technical, clerical, mechanical, and similar occupations" as defined further in subdivision 2(C). This language is poorly adapted to serve the purpose of a definition of the term "administrative" and is obviously intended to state the broad application of wage order No. 4 as a whole. Moreover, as we will see in our examination of the legislative history, the language (with the exception of the word "mechanical") predates the introduction of the term "administrative" in the regulation and therefore cannot be read as intended to define that term.

requirements for administrative employees.[5] The minutes of an IWC meeting on March 7, 1947, record that the commission received testimony "that the inclusion of executive, administrative and professional women within the coverage of the orders prevented these employees from having the necessary freedom of action required for advancement in such positions. Therefore the Commission concluded that women holding such positions be exempted from coverage and standards were set for the determination of bona fide executive, administrative, or professional employment, *using Federal criteria as a guide.*" [Italics added.][6]

Following the meeting, the IWC adopted amendments to wage orders applying to nine industries that specifically exempted "women employed in administrative, executive, or professional capacities" and described the duties of such women employees in language drawn

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[5] The pertinent provision of wage order No. 4, CCR, title 8, former section 11345 (the predecessor of § 11040), did contain an exemption for professional employers, but this limited exemption was not found in other wage orders. Section 11345 then provided: "All provisions of this Order shall apply to all women and minor employees employed in technical, clerical and similar occupations by any employer, whether on a time, piece rate or other basis of pay. The provisions of Section 11347 shall not apply to women and minors employed in professional occupations."

[6] The Report of the Division of Industrial Welfare for the Governor's Council for March 1947 similarly states, "Women employed in administrative, executive or professional capacities are exempted from all of the orders." (Cal. Dept. Industrial Relations, Rep. for Governor's Council (p. 13.))

from federal regulations.[7] The amendment to wage order No. 4, however, did not contain the reference to "administrative, executive, or professional capacities" found in the other nine wage orders, perhaps because the industrial class, "[p]rofessional, technical, clerical and similar occupations," was then defined by CCR, title 8, former section 11346, subdivision (c), in a way that appeared to exclude these categories of employees. Nevertheless, the pertinent provision in wage order No. 4, former section 11345, was amended to include the same description of the duties of exempt employees, drawn from federal regulations, as that of the other nine wage orders. Effective June 1, 1947, former section 11345 provided: "the provisions of this Order shall not apply to women employed where one of the following conditions prevails: [¶] (a) The employee is engaged in work which is *predominantly intellectual, managerial,* or *creative;* which requires *exercise of discretion and independent judgment;* and for which the remuneration is not less than $250 per month; or [¶] (b) The employee is . . . [licensed in a designated profession]. . . . "[8] (Italics added.)

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[7] See Article 3, Amusement and Recreation Industries; Article 4, Canning and Preserving Industries; Article 5, Industries Handling Farm Products After Harvest; Article 6, Laundry, Dry Cleaning and Dyeing Industry; Article 7, Manufacturing Industry; Article 8, Mercantile Industry; Article 11, Personal Service Industry; Article 13, Public Housekeeping Industry; and Article 15, Transportation Industries.

[8] In 1947, 29 Code of Federal Regulations (hereafter C.F.R.), part 541.3 defined the term "professional" as referring to any employee engaged in work "(1) *predominantly intellectual* and varied in character . . . and (2) requiring the consistent *exercise of discretion and judgment* in its performance . . . " or, alternatively,

In 1957, as part of a recodification of wage order No. 4, the description of industrial occupations included within the category of "professional, technical, clerical and similar occupations" was greatly expanded, and CCR, title 8, former section 11345 was amended to insert the phrase "administrative, executive, or professional capacities"[9] in front of the description of the duties of exempt employees added by the 1947 amendment. The triad of terms, "administrative, executive, or professional," now included in wage order No. 4 as well as other wage orders, plainly borrowed from parallel language in section 13(a) of the federal Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq. (FLSA)), which then provided that the act "shall not apply with respect to – (1)

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as referring to employees engaged in work "*predominantly* original and *creative* in character in a recognized field of artistic endeavor. . . . " Part 541.2 of 29 C.F.R. defining "administrative employees" contained four references to "*discretion and independent judgment.*" The definition of "executive employee" in 29 C.F.R. part 541.1 described duties relating to "management."

[9] As amended on November 15, 1957, CCR, title 8, former section 11345, subdivision (b), provided: "The provisions of Sections 3 through 12 shall not apply to women employed in administrative, executive, or professional capacities. No woman shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails: [¶] (1) The employee is engaged in work which is predominantly intellectual, managerial, or creative; and which requires exercise of discretion and independent judgment; and for which the remuneration is not less than $350 per month; or [¶] (2) The employee is licensed . . . [in a designated profession]. . . . "

any employee employed in a bona fide executive, administrative, or professional capacity. . . . " The minor variation in language – the change in the order of the terms and omission of the adjective "bona fide" – does not appear to signify a difference of substance.

CCR, title 8, section 11345 was amended in 1973 to apply to all employees rather than only to women and children and was later recodified as CCR, title 8, section 11040, but, in other respects, it underwent only minor changes in the decades after 1957. It was not until after summary judgment was granted in this case that section 11040 was again revised in a more significant way through an amendment, effective June 30, 2000, which we will consider later in this opinion.

In our view, this regulatory history supports the use of federal authorities as an aid to interpretation of the administrative exemption of CCR, title 8, section 11040, subdivision 1(A). A distinct degree of modeling after federal regulations is apparent in language describing the duties of exempt employees introduced in the 1947 amendments to wage order No. 4 and corresponding provisions of other wage orders. A more obvious modeling is manifest in the use of the expression "administrative, executive, and professional capacities" added to nine wage orders by the 1947 amendment and included in wage order No. 4 by the 1957 amendment. To the extent that the language of these amendments is patterned after federal statutes and regulations, federal law becomes relevant to interpretation.

The relevance of federal law in construing IWC wage orders finds further confirmation in the interpretative

letters of the Department of Labor Standards Enforcement (DLSE). "As a general rule, the courts defer to the agency charged with enforcing a regulation when interpreting a regulation because the agency possesses expertise in the subject area." (*Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 28 [285 Cal.Rptr. 515]; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 21 [78 Cal.Rptr.2d 1, 960 P.2d 1031].) The DLSE " 'is the state agency empowered to enforce California's labor laws, including IWC wage orders.' [Citation.]" (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581 [94 Cal.Rptr.2d 3, 995 P.2d 139].) In fact, "Labor Code sections 61 and 1193.5 specifically empower the DLSE to interpret and enforce IWC Orders with the primary objective of protecting workers." (*Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 974 [38 Cal.Rptr.2d 549], disapproved on another point in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574 [59 Cal.Rptr.2d 186, 927 P.2d 296].) Thus, it is clear that "DLSE's interpretation of an IWC order is entitled to great weight. . . . " (*Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, 30 [273 Cal.Rptr. 615].)

The DLSE has interpreted the exemption for administrative employees in CCR, title 8, section 11040, subdivision 1(A), in two advice letters issued on October 5, 1998, and January 7, 1993. Advisory opinions of this sort, while not controlling upon the courts by reason of their authority, do constitute " 'a body of experience and informed judgment' 'to which courts and litigants may properly resort for guidance.' [Citation.]" (*Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th at p. 14.) Thus, in *Morillion v. Royal Packing Co., supra,* 22

Cal.4th at page 584, the court reviewed two DLSE advice letters and found support in the fact that the DLSE interpretation was consistent with its independent analysis.[10] (See also *Tidewater Marine Western, Inc. v. Bradshaw, supra,* 14 Cal.4th at p. 571.)

In the advice letter dated October 5, 1998, the DLSE noted that, despite certain differences between state and federal law, "the Division of Labor Standards Enforcement has traditionally followed federal cases and federal regulations, to the extent that such cases and regulations are not inconsistent with state wage and hour provisions, in interpreting and enforcing the various IWC wage orders. . . . " (Cal. Dept. Industrial Relations, DLSE Chief Counsel Miles E. Locker, advice letter, Applicability of the Administrative Exemption to Insurance Company Claims Representatives (Oct. 5, 1998) p. 7.) An earlier advice letter dated January 7, 1993, went further to suggest that the federal regulations are directly applicable to the administrative exemption under state law: "The Department of Labor's regulations discuss the administrative exemption in detail at 29 C.F.R. § 541.201 through § 541.208 and the DLSE *adopts* those definitions." (Cal.

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[10] Consistent with *Tidewater Marine Western, Inc. v. Bradshaw, supra,* 14 Cal.4th 557, we do not defer to the DLSE's interpretation of "administrative capacity" in the Operations and Procedures Manual, issued by the DLSE in September 1989. The *Tidewater* decision holds that the manual constitutes a regulation and therefore is void because it was not adopted in accordance with the Administrative Procedure Act. (Gov.Code § 11340 et seq.) We regard this holding as also applying to the Enforcement Policies and Interpretations Manual, issued by the agency in October 1998.

Dept. Industrial Relations, DLSE Chief Counsel H. Thomas Cadell, Jr., advice letter, Exempt Employees – "Salary Basis Test" (Jan. 7, 1993) p. 8, italics added.)

Without examining the specific rulings of these advice letters or approving any theory of implied "adoption" by reference to the federal regulations, we view the advice letters as confirming the general conclusion that we earlier reached through a review of the state regulatory history – federal authorities are relevant to interpretation of the term "administrative capacity."

FIE argues that the IWC has rejected "the federal test of exemption" on three occasions by declining to adopt proposals to amend the regulatory exemption along the lines of federal models.[11] But our review of the regulatory history reveals no more than a sufficient degree of parallelism to justify looking to federal law for guidance. The fact that the IWC has on certain occasions rejected proposals for closer patterning of state regulations after federal models does not affect the parallelism that does exist.

Somewhat inconsistently, FIE argues that an absence of parallelism between the exemption provisions of wage order No. 4 and federal law is shown by the fact that, during the pendency of this appeal, the wage order was revised comprehensively, effective June 30, 2000, to more

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[11] FIE cites an IWC ruling dated October 21, 1988, denying a petition of the California Hospital Association dated September 1986; a petition of the California Hospital Association dated February 1981, apparently denied in an unidentified order; and the vote on a motion noted in the minutes of an IWC meeting on March 2 and 3, 1976.

closely conform to federal regulations.[12] It invokes the principle that " ' "any material change in the language of the original act is presumed to indicate a change in legal rights" '. . . . " (*Dubins v. Regents of University of California* (1994) 25 Cal.App.4th 77, 85 [30 Cal.Rptr.2d 336], citations omitted), and reasons that, since the regulation is now modeled after federal regulations, it may be inferred that it was not so modeled before the recent amendment. Plaintiffs counter by arguing that the recent revision manifests an intention to clarify preexisting law. (See *Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 399 [276 Cal.Rptr. 524].) In their view, the amendment confirms the relevance to previous orders of certain specific language in federal regulations ("work directly related to management policies or general business operations . . . "). (29 C.F.R. § 541.2(a)(1) (2000).)

We are reluctant to draw any inference from the recent amendment that is any broader than the circumstances merit. The recent amendment, however, is unquestionably a further instance in which the IWC has drawn on federal law to enact a significant amendment to the exemption provisions of wage order No. 4, following earlier amendments in 1947 and 1957. To the extent that the amendment tends to reveal a continuing IWC policy, it supports the relevance of federal law to interpretation of the administrative exemption.

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[12] The amendment was adopted at a public hearing on June 30, 2000. A statement of the basis for the amendment was issued by the IWC on October 1, 2000. (Cal. Dept. Industrial Relations, Statement as to the Basis (Oct. 1, 2000).)

Our conclusion affirming the relevance of federal law is consistent with a significant body of case law. In *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 658 [224 Cal.Rptr. 688, 715 P.2d 648], our high court noted, "Federal decisions have frequently guided our interpretation of state labor provisions the language of which parallels that of federal statutes." Court of Appeal decisions add: "Because the California wage and hour laws are modeled to some extent on federal laws, federal cases may provide persuasive guidance." (*Nordquist v. McGraw-Hill Broadcasting Co., supra,* 32 Cal.App.4th at p. 562.) "California courts have recognized that California's wage laws are patterned on federal statutes and that the authorities construing those federal statutes provide persuasive guidance to state courts." (*Monzon v. Schaefer Ambulance Service, Inc., supra,* 224 Cal.App.3d at p. 31; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726, fn. 1 [245 Cal.Rptr. 36]; *Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, 550 [227 Cal.Rptr. 453].)

In *Bono Enterprises, Inc. v. Bradshaw, supra,* 32 Cal.App.4th at page 976, the court noted an important qualification on the relevance of federal authorities in this area: "the state is empowered to go beyond the federal regulations in adopting protective regulations for the benefit of workers. [Citation.] The federal authorities are of little if any assistance in construing state regulations which provide greater protection to workers."

The recent decision in *Ramirez v. Yosemite Water Co., supra,* 20 Cal.4th 785, illustrates these principles. The court began by noting that "[t]he IWC's wage orders, although at times patterned after federal regulations, also

sometimes provide greater protection than is provided under federal law in the Fair Labor Standards Act (FLSA) and accompanying federal regulations." (*Id.* at p. 795.) The issue on appeal concerned the definition of the exemption for "outside salesmen." With respect to this matter, state law did in fact provide greater protection for employees than its federal analog. (Compare Lab. Code, § 1171 and CCR, tit. 8, § 11070, subds. 1(B) and 2(I) with 29 C.F.R. §§ 541.5 and 541.505 (2000).) Accordingly, the court held that the trial court erred in relying on federal authorities in construing the wage order: "where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced." (*Ramirez v. Yosemite Water Co., supra,* at p. 798.)[13]

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[13] The pertinent differences between the state and federal definitions of the outside salesman exemption related to the required degree of employment in the exempt activity. CCR, title 8, section 11070 employed "a purely quantitative approach, focusing exclusively on whether the individual 'works more than half the working time . . . selling . . . or obtaining orders or contracts.' [Citation.]" (*Ramirez v. Yosemite Water Co., supra,* 20 Cal.4th at p. 797.) Federal law provided a qualitative approach, focusing on the employee's "primary function" (29 C.F.R. § 541.505(a) (2000)), which was potentially more expansive. In footnote 4, the court noted that the exemption for administrative, executive and professional employees presented a similar contrast. (Compare CCR, tit. 8, § 11040, subd. 1(A)(I) ["engaged in work which is primarily"] and subd. 2(K) [" 'Primarily' . . . means more than one-half of the employee's work time"] with 29 C.F.R. §§ 541.1(a), 541.2(a) and 541.3(a) ["primary duty"].) Since the present case does not concern the meaning of these terms, the differences noted by the court have no relevance to our analysis here.

FIE argues that *Morillion v. Royal Packing Co., supra,* 22 Cal.4th 575 expands the holding of *Ramirez* into a rule of presumptive irrelevance of federal authorities in construing wage and hour laws, "[a]bsent convincing evidence of the IWC's intent to adopt the federal standard. . . . " (*Morillion v. Royal Packing Co ., supra,* at p. 592.) We do not, however, read *Morillion* as being inconsistent with other precedents relying on the guidance of federal law. The decision concerned the compensable nature of travel time as part of hours worked by agricultural employees. The federal definition of hours worked differed from the state definition by expressly exempting travel time. The court held only that it was error to invoke a differing federal standard to restrict the broader protections available under state law. "In determining how much weight to give federal authority in interpreting a California wage order," the court cautioned, it is necessary first to make a comparative analysis of the two "statutory schemes." (*Id.* at p. 588.)

3. *Administrative/production Worker Dichotomy*

Our analysis thus far has established two very general propositions: first, the statutory context and applicable rules of interpretation suggest that the term "administrative capacities" in subdivision 1(A) of wage order No. 4 (CCR, title 8, § 11040) should be construed independently of the language in subpart (1) of the subdivision so as to form part of the definition of the administrative exemption, and, second, federal authorities construing parallel provisions of the FLSA are relevant to construing the exemption provisions of wage order No. 4.

Turning to federal interpretative regulations, we observe at the outset distinct criteria addressing the *role* of administrative employees in a business enterprise, the actual *duties* of the employees, and the employees' level of *remuneration*. The so-called "short test" of administrative employee status – applying to the great majority of employees with weekly remuneration above $250 per week – effectively follows this analytical distinction by directing separate consideration of the employee role as described in 29 C.F.R. part 541.2(a), and the existence of duties "requiring the exercise of discretion and independent judgment."[14] (29 C.F.R. § 541.2(e)(2).) The "long test" – applying only to the extremely limited category of employees with remuneration between $155 and $250 per week – may also be broken into criteria pertaining to employee role and employee duty.[15]

The criteria of administrative capacity in subpart (1) of subdivision 1(A) of CCR, title 8, section 11040 address employee duties and level of remuneration. To the extent that the criteria relating to employee duties are parallel to those of federal law, we may look to federal authorities as

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[14] For a discussion of the differences between the "short test" and "long test," see *Martin v. Cooper Elec. Supply Co.* (3d Cir. 1991) 940 F.2d 896, 901. In general, the short test in 29 C.F.R. part 541.2(e)(2) is articulated more fully in part 541.214. Both section 541.2(e)(2) and part 541.214 lead directly, or by way of reference, to the meaning of the phrase "work directly related to management policies or general business operations" as defined in part 541.205.

[15] Part 541.2(e)(1), addresses the employee role; the other additional provisions of the "long test" relate to employee duties.

an aid in their interpretation. But our conclusion that the term "administrative capacities" should be given independent significance inevitably leads also to consideration of the employee role in the business enterprise. If we were not free to inquire into the employee role, the term "administrative capacities" would add nothing significant to the criteria relating to employee duties in subpart (1) of CCR, title 8, section 11040, subdivision 1(A); it is only to the extent that the term "administrative capacities" allows consideration of matters not covered by subpart (1) that it effectively assumes an independent significance. A close reading of the subdivision reveals that it is those matters relating to employee role that are not covered by subpart (1).

We wish to make clear that we do not perceive a degree of parallelism between federal and state law that would make the entire corpus of federal regulations construing the administrative exemption directly applicable to the exemption provision of wage order No. 4. We look to federal law only for insights and a general methodology in construing the term "administrative capacities." With respect to the employee role in the business enterprise, we find such insight and methodology in the administrative/production worker dichotomy on which plaintiffs chiefly relied in their motion for summary adjudication.

Drawing on 29 C.F.R. parts 541.2 and 541.205(a),[16] federal authorities draw a distinction between

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[16] Part 541.205 of 29 C.F.R. defines the phrase in part 541.2, "directly related to management policies or general business operations of his employer or his employer's customers, . . . " The pertinent language in section 541.205(a) is the following:

administrative employees, who are usually described as employees performing work "directly related to management policies or general business operations of his employer or his employer's customers,"[17] and production employees, who have been described as "those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce." (*Dalheim v. KDFW-TV* (5th Cir. 1990) 918 F.2d 1220, 1230.)

Though it offers a broad distinction demanding further refinement in some cases, the administrative/production worker dichotomy, as elucidated by federal decisions, has proven to be a useful approach to construing a statutory term that appears in a closely parallel context in the FLSA and CCR, title 8, section 11040. Since the federal decisions employing this dichotomy concern the meaning of a statutory term, they would offer authoritative interpretation of that term even in the absence of the interpretative regulations on point. Nevertheless, to the extent that the dichotomy is linked to the interpretative regulations, it is worth noting that the distinction

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"The phrase 'directly related to management policies or general business operations of his employer or his employer's customers' describes those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work."

[17] Using a variation on this language of the interpretative regulations, the court in *Martin v. Cooper Elec. Supply Co., supra,* 940 F.2d at p. 906, refers to employees "involved directly or indirectly in the determination, administration or implementation of Cooper's management or operational policies."

draws on regulatory language ("directly related to management policies or general business operations") that dates back to the earliest federal interpretative regulations and now has a critical place in the definition of the term "administrative" capacity in 29 C.F.R. part 541.2.

When the term "administrative" was added to CCR, title 8, former section 11345 in the 1957 amendment, the term had long been defined in 29 C.F.R. part 541.2, subdivision (a)(1), as referring to employees performing work "directly related to management policies or general business operations. . . . "[18] In later revisions and elaborations of the federal regulations, this phrase acquired a more central place in the definition of "administrative" employee in 29 C.F.R. part 541.2, and came to be separately defined in 29 C.F.R. part 541.205. At the time of the summary judgment motion, both the "short" and "long" test of administrative employee status described an administrative employee as one whose "primary duty" consists of the "performance of office or nonmanual work *directly related to management policies or general business operations of his employer* or his employer's customers." (Italics added.)

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[18] Effective October 15, 1940, 29 C.F.R. part 541.2 provided: "The term 'employee employed in a bona fide administrative capacity' . . . shall mean any employee (a) . . . [with a stated remuneration], and . . . (b)(2) who performs under only general supervision, responsible nonmanual office or field work, *directly related to management policies or general business operations*, . . . (3) whose work involves the execution under only general supervision of special nonmanual assignments and tasks *directly related to management policies or general business operations*. . . . " [Italics added.]

A leading decision construing the administrative/production worker dichotomy, *Dalheim v. KDFW-TV, supra,* 918 F.2d 1220, addressed a claim of exemption for news producers. Rejecting an argument that the concept of production applies only to manufacturing employees, the court stated, "The distinction § 541.205(a) draws is between those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market." (*Id.* at p. 1230, fn. omitted.) By this test, the court concluded that the news producers were production employees. (See also *Freeman v. National Broadcasting Co., Inc.* (S.D.N.Y. 1993) 846 F.Supp. 1109, 1154, revd. on other grounds in *Freeman v. National Broadcasting Co., Inc.* (2d Cir. 1996) 80 F.3d 78.)

The decision in *Martin v. Cooper Elec. Supply Co., supra,* 940 F.2d at page 901, underscored "the analytical importance of an administrative/productive work dichotomy. . . . " (Italics omitted.) The principal issue there related to the status of inside salespersons employed by a wholesale electrical supplier. Holding that the inside salespersons were production rather than administrative employees, the court began its analysis by considering " 'the nature of the employer's business.' " (*Id.* at p. 903.) The stipulations of the parties, it found, "reflect the underlying reality of wholesale sales enterprises like Cooper: they aim to produce wholesale sales. It follows that Cooper's inside salespersons may be classified as 'production' rather than 'administrative' employees. . . . " (*Ibid.,* italics omitted.)

Another line of authority has applied the administrative/production distinction to government workers. Holding that deputy probation officers and children treatment counselors were not within the administrative employee exemption, the court in *Bratt v. County of Los Angeles* (9th Cir. 1990) 912 F.2d 1066, 1070, observed, "The services the Employees provide the courts do not relate to court policy or overall operational management but to the courts' day-to-day production process." (Followed in *Roney v. United States* (D.D.C. 1992) 790 F.Supp. 23, 27 [deputy marshals].) Again, in *Reich v. State of New York* (2d Cir. 1993) 3 F.3d 581, 587-588, the court characterized the work of investigators for the New York Bureau of Criminal Investigations as being "squarely on the 'production side' of the line" since their primary function was to conduct the service performed by the Bureau – criminal investigations. (See also *Harris v. District of Columbia* (D.D.C. 1990) 741 F.Supp. 254, 262 ["housing inspections . . . are the 'production' of the Housing Inspection Branch."].)

Several federal district court decisions have particular relevance to the present case. In *Reich v. American Intern. Adjustment Co., Inc.* (D.Conn. 1994) 902 F.Supp. 321, 325, the court employed "a production/administrative test" to hold that automobile damage appraisers did not qualify as exempt administrative employees: "AIAC is in the business of resolving damage claims. The appraisers perform the day-to-day activities of the business through their fact finding and damage evaluations. The appraisers do not administer the business of AIAC." Similarly, in *Fleming v. Carpenters/Contractors Cooperation Com.* (S.D.Cal. 1993) 834 F.Supp. 323, 327, the court held

that field investigators were "production employees" because they "were engaged in the day-to-day carrying out of CCC's mission of finding and reporting labor law violations committed by contractors on public work projects." (Accord: *Gusdonovich v. Business Information Co.* (W.D.Pa. 1985) 705 F.Supp. 262, 265 ["BIC's business is 'producing' information for its clients, and the plaintiff's duties consisted almost entirely of gathering that 'product'."].)

We find the analysis in *Reich v. Chicago Title Ins. Co.* (D.Kan. 1994) 853 F.Supp. 1325 to be especially instructive. The court examined the duties of the plaintiff escrow closers "to determine whether they carry out Chicago Title's day-to-day operations . . . or whether they administer the business affairs . . . [of the company]." Finding that escrow closers were engaged in day-to-day operations, the court stated, "Chicago Title is in the escrow closing business, and its . . . status as a title insurer does not alter the fact that escrow closings are a very real product . . . , which it markets and sells separate from . . . its overall title insurance operations." (*Id.* at p. 1330, fn. omitted.)

4. *The Motion for Summary Adjudication*

Seeking to place themselves on the production side of the administrative/production worker dichotomy, plaintiffs describe FIE as "the claims handling arm of the 'Farmers Insurance Group of Companies' " and argue that claims representatives perform the service that FIE

exists to produce and market. We will review the undisputed evidence on point and then consider the propriety of the remedy of summary adjudication.

By all accounts, FIE performs a specialized function within the Farmers Insurance Group of Companies, having delegated activities normally associated with an insurance business to other related companies. First, it is undisputed that FIE does not carry out the sales activities ordinarily involved in operating an insurance business. As stated in the declaration of an FIE manager, Mickey Shields, submitted in opposition to the motion, "[c]laims representatives do not sell insurance policies, they are not authorized to sell insurance policies and they have no duties with regard to the sale of reinsurance. FIE sells insurance policies through the use of independent contractor agents."

Secondly, as a reciprocal insurance exchange, FIE is managed by a related company, Farmers Group, Inc., known as the attorney-in-fact, which performs activities that would normally be included within the executive and administrative functions of a corporation.[19] In its separate statement of disputed and undisputed facts, FIE acknowledges that these functions include "human resources (including compensation and benefits); payroll financial oversight; development of sales and marketing strategy and techniques; development and pricing of insurance products; financial and regulatory auditing;

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[19] On the management of a reciprocal insurance exchange, see generally Insurance Code section 1300 et seq., and *Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 702-705 [57 Cal.Rptr.2d 798].

public relations; legal counselling; underwriting; data processing and other non-claims related matters." In the words of an executive of Farmers Group, Inc., Thomas Norman, "Farmers Group, Inc. manages Farmers Insurance Exchange affairs." This testimony is confirmed by undisputed facts showing that claims representatives have no formal advisory role in setting FIE's overall claims handling policy and procedures or in managing FIE's business infrastructure, including purchasing, budgeting, and staffing.

Plaintiffs maintain that, in the absence of ordinary sales or managerial functions, "[t]he sole function of FIE's operation is handling claims arising under insurance policies." The statement is well documented by testimony of FIE managers and executives. For example, Thomas Norman stated unequivocally, "The Farmers Insurance Exchange does not do anything other than the claims function. . . . " Again, a branch claims manager, Stuart Craig, testified that "the mission" of his office is "property claims handling." Approximately half of his staff consists of claims representatives and the other employees provide clerical support and supervision.

We find it particularly significant that FIE performs a substantial amount of claims handling work for other related companies within the Farmers Insurance Group of Companies and is reimbursed for the cost of these services. An FIE executive, Maryann Seltzer, testified that FIE at times provides "claims- related services on policies issued by . . . Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, and approximately eight domestic stock corporations domiciled

throughout the United States," such as the Farmers Insurance Company of Oregon, the Farmers Insurance Company of Arizona, and various other companies. Seltzer testified that these related companies do not employ claims representatives in California other than those employed by FIE.

In its opposition to the motion for summary judgment, FIE advances a broader description of both FIE's business functions and the duties of claims representatives. We note, however, that the factual opposition to the motion is based entirely on declarations of the management executives, Seltzer and Shields. To the extent that these declarations are inconsistent with deposition testimony, we are mindful of the principle that statements against interest in depositions are "entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22 [112 Cal.Rptr. 786, 520 P.2d 10].)

With respect to FIE's business functions, the Seltzer declaration maintains: "FIE is in the business of designing, selling and reinsuring insurance policies. Thus, FIE is not in the business of merely 'handling claims' nor is the sole function of FIE's operation the processing of claims arising from insurance policies it insures and reinsures. The function of FIE's business operations after the sale and reinsurance of insurance policies is to protect the financial and business interests of FIE through the adjustment and settlement of claims made by insureds and third parties."

In this appeal, however, we are concerned only with the business function of the branch claims offices in California where the plaintiffs worked. On this point, we consider that the Seltzer declaration fails to create a material issue of fact. Whatever may be the functions performed elsewhere in the FIE organization or within the Farmer's Insurance Group of Companies, a massive amount of evidence in the record, derived from testimony of FIE executives and managers, establishes that the business of the branch claims offices is to handle claims.

Bearing in mind the principle that "[t]he affidavits of the moving party are strictly construed and those of his opponent liberally construed," the Seltzer declaration at most establishes that other, vaguely described business functions are carried out elsewhere in the FIE organization. (*Slobojan v. Western Travelers Life Ins. Co.* (1969) 70 Cal.2d 432, 437 [74 Cal.Rptr. 895, 450 P.2d 271].) It remains undisputed that, in the words of an FIE vice-president, Clinton Gardner, "one of the important components of Farmers operating their business is to adjust claims that are presented." This "important component" of FIE's operation is, beyond any factual controversy, carried out in branch claims offices.

The Shields declaration attacks plaintiffs' assertion that claims representatives in branch claims offices carry out the business function of claims adjustment. The declaration maintains, that besides their duties in "settling claims," claims representatives have a number of other duties: "In addition to settling claims, Claims Representatives must also perform other duties as part of their job, including determining liability, setting and/or recommending reserves, recommending coverage, estimating

damage or loss, providing risk advice, identifying subrogation rights, detecting potential fraud, determining whether reservation of rights letters should be sent, and representing the company at mediations, arbitrations and settlement conferences. . . . "

The additional duties described by the Shields' declaration, however, are all associated in some manner with the claims adjusting function. Moreover, the record reveals that, to the extent that these additional duties extend beyond the core tasks of claims adjusting, they involve intermittent and incidental tasks that involve a small part of the claims representatives' time (e.g., coverage issues, attendance at mediations, arbitrations and settlement conferences). The declaration does not rebut other testimony that the claims representatives fully engaged in the work of claims adjusting. As described in plaintiffs' statement of undisputed facts, the bulk of their time is involved in "investigating and estimating claims, communicating with policy holders and third party claimants about the indemnity value of the claim, filling out numerous forms, performing various other clerical work, such as photocopying and matching mail to files, and with respect to field claims representatives, driving."

Our review of the undisputed evidence places the work of the claims representatives squarely on the production side of the administrative/production worker dichotomy. The undisputed evidence establishes that claims adjusting is the sole mission of the 70 branch claims offices where plaintiffs worked. The claims representatives are fully engaged in performing the day-to-day activities of that important component of the business. (See *Bratt v. County of Los Angeles, supra,* 912 F.2d at p.

1070; *Fleming v. Carpenters/Contractors Cooperation Com., supra,* 834 F.Supp. at p. 327.)

We turn now to the question whether our conclusion that plaintiffs are production workers justifies the order of summary adjudication. Plaintiffs cite a line of federal decisions that have granted, or affirmed, summary judgments for plaintiffs on a finding that they were production workers within the meaning of the administrative/production worker dichotomy. (*Reich v. State of New York, supra,* 3 F.3d at pp. 585, 589; *Reich v. Chicago Title Ins. Co., supra,* 853 F.Supp. at pp. 1327-1332; *Gusdonovich v. Business Information Co., supra,* 705 F.Supp. at p. 265; *Adam v. United States* (U.S.Claims Ct. 1992) 26 Cl.Ct. 782, 787-788.)

We recognize that the administrative/production worker dichotomy is a somewhat gross distinction that may not be dispositive in many cases. The federal decisions granting judgment for plaintiffs on the basis of this dichotomy were decided in the context of interpretative regulations that guard against an overly broad application of the distinction. For example, some businesses, such as management consulting firms, may provide services that clearly pertain to business administration, even though they are activities that the businesses exist to produce and market. The federal regulations address such management-related services in 29 C.F.R. parts 541.2(a), and 541.205(a).[20] (See *Piscione v. Ernst & Young, L.L.P.* (7th Cir. 1999) 171 F.3d 527, 540.)

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[20] Section 541.2(a)(1) refers to work "directly related to management policies or general business operations . . . [of the] *employer's customers.* . . . " [Italics added.] Part 541.205(a), refers to persons performing work "of substantial importance to

Again, some employees perform specialized functions within the business organization that cannot be readily categorized in terms of the administrative/production worker dichotomy. (See *Haywood v. North American Van Lines, Inc.* (7th Cir. 1997) 121 F.3d 1066 [customer service representative].) Other employees perform jobs involving wide variations in responsibility that may call for finer distinctions than the administrative/production worker dichotomy provides. Claims adjusting may in fact serve as an illustration. A 1940 report of the Wage and Hour Division of the United States Department of Labor entitled " 'Executive, Administrative, Professional . . . Outside Salesman' Redefined" observed, "As another illustration, the term 'claim agent' may cover a great variety of employees. A claim agent who settles claims for damages which in no case amount to more than five or ten dollars obviously performs mere routine work. On the other hand, a claim agent for a large oil company who is given authority to settle claims that amount to several thousand dollars . . . has authority to affect the welfare of his employer in the most substantial degree."[21]

The federal regulations permit the kind of distinctions that are suggested by the Department of Labor report. Part 541.205(c)(5) of 29 C.F.R. places "claim agents and adjusters" in a listing of administrative employees

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the management or operation of . . . [the] *employer's customers.*" [Italics added.]

[21] Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition entitled, " 'Executive, Administrative, Professional . . . Outside Salesman' Redefined," effective October 24, 1940 (published by G.P.O. Washington) page 25.

engaged as "advisory specialists and consultants." (See *Haywood v. North American Van Lines, Inc., supra,* 121 F.3d at pp. 1071-1072.) On the other hand, 29 C.F.R. part 541.205(a) limits the exemption to "persons who perform work of substantial importance to the management or operation of the business of his employer," and 29 C.F.R. part 541.205(c)(2) refers to "an inspector for an insurance company" as an example of an employee performing "routine clerical duties."

In the absence of detailed interpretative regulations comparable to those in federal cases, we consider that California courts must use great caution in granting summary judgment or summary adjudication on the basis of such a broad distinction as the administrative/production worker dichotomy. Nevertheless, we are persuaded the trial court properly granted summary adjudication in the present case on the basis of FIE's own characterization of the claims representative's role in the company. The Regional Claims Manual of the Farmers Insurance Group states, "We have made a deliberate decision to vest the responsibility for our operations upon the branch and regional claims managers, and it is necessary that these officials accept this in its full sense. Again, *the actual handling of the routine and unimportant may be delegated, but questions of importance must be decided by the branch claims manager, and at a higher level by the regional claims manager.*" [Italics added.]

Other evidence confirms that the claims representatives in the personal lines division are ordinarily occupied in the routine of processing a large number of small claims. In the case of automobile physical damage claims, the average cost of repair is $3,000 and the average cost of

a total loss is $6,000. Only underinsured motorist claims, which account for only about one percent of the workload, may average above $20,000. The average costs of other categories of property damage and liability claims range between $2,000 and $8,000. For example, the average cost of residential building damage claims is slightly over $3,000. The claim representatives' authority to settle claims is set at a low level that reflects the small size of most claims. With few exceptions the representatives' file authority is set at $15,000 or lower and often is $5,000 or lower.

On matters of relatively greater importance, the claims representatives acted as investigators or as conduits of information to supervisors. For example, they were instructed to fill out appropriate forms detailing information that might indicate an unusual risk; the forms were then referred to the underwriting department which would review the decision to renew the insured's policy. Again, they were expected to gather information on subrogation potential, which their supervisors could use in deciding to present a claim to a third party. In the event of litigation, they operated as "go-betweens" in conveying information to the attorney. Similarly, on coverage questions involving interpretation of the policy, they were expected to bring information to the attention of supervisors, who would instruct them what to do.

In short, the record as a whole confirms the accuracy of FIE's own description of the claim representatives' responsibilities as being restricted to "the routine and unimportant." On matters of relatively greater importance, they are engaged only in conveying information to

their supervisors – again primarily a "routine and unimportant" role. This characterization of their role in the company places plaintiffs in the sphere of rank and file production workers. More precisely stated, plaintiffs render a service within an important component of the FIE business organization, i.e., the branch claims offices, which this component of the organization exists to produce. Following federal precedents, we hold that this characterization of the plaintiffs' role in the business organization places them clearly outside the category of administrative workers. We therefore conclude that the trial court properly ruled, as a matter of law, that plaintiffs were not employed in "administrative capacities" within the meaning of the language of subdivision 1(A) of wage order No. 4.

Our conclusion obviates the need to inquire into the plaintiffs' duties, that is, whether the plaintiffs are "engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment" within the meaning of subdivision 1(A)(1) of wage order No. 4 (CCR, tit. 8, § 11040) and parallel federal regulations. (Cf. *Martin v. Cooper Elec. Supply Co., supra,* 940 F.2d at p. 907, fn. 10; *Reich v. Chicago Title Ins. Co., supra,* 853 F.Supp. at p. 1329; *Freeman v. National Broadcasting Co., Inc., supra,* 846 F.Supp. at p. 1154.) Since the term "administrative capacity" imposes an independent requirement of the exemption, our conclusion that claims representatives do not work in an "administrative role" within the FIE business organization is dispositive and establishes their nonexempt status. We reach this conclusion through an analysis of the peculiar nature of FIE's business and the

claims representatives' role in that business, while recognizing that a careful analysis of the employees' duties may be necessary to determine exempt or nonexempt status in other cases.

B. *Statutory Authority for Interim Award of Attorney Fees*

Having found no error in the decisional underpinning of the award of attorney fees, we proceed to consider whether the applicable statute, Labor Code section 1194,[22] authorizes an interim award of attorney fees.

Labor Code section 1194 is a "one-way" fee-shifting statute, which gives employees the right to recover reasonable attorney fees in a successful suit for overtime compensation, without giving employers any corresponding right in the event of a successful defense of an employee suit. The statute originally conferred on employees only the right to recover costs of suit, but a 1991 amendment added the rights to recover prejudgment interest and reasonable attorney fees. (Stats. 1991, ch. 825, § 2, p. 3666.) As so amended, section 1194, subdivision (a), provides in pertinent part: "any employee receiving less than . . . the legal overtime compensation applicable to the employee is entitled to

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[22] The order granting interim payment of attorney fees, filed April 20, 2000, was based on both Labor Code sections 218.5 and 1194, subdivision (a), but the decision in *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420 [95 Cal.Rptr.2d 57], decided the same day, held that the provisions of section 1194 alone control the award of attorney fees in overtime claim cases. Accepting the holding in the *Earley* decision, plaintiffs base their arguments in this appeal solely on section 1194.

recover in a civil action the unpaid balance of the full amount of this . . . overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

As noted in *Earley v. Superior Court, supra,* 79 Cal.App.4th at page 1428, the legislative history of the 1991 amendment of Labor Code section 1194 reveals that it was intended to provide a " 'needed disincentive to violation of minimum wage laws.' (Sen. Rules Com., Analysis of Sen. Bill No. 955 (1991-1992 Reg. Sess.) as amended Sept. 10, 1991. . . .) An analysis of the bill submitted to the Senate in advance of the vote stated that, '[t]hese additional remedies are especially necessary in situations where the employees themselves pursue a private action to recover unpaid wages or overtime.' (*Ibid.* (Italics omitted.))"

Plaintiffs argue that, in complex and protracted litigation, an interim award of attorney fees is needed to carry out the legislative intent of enabling employees to bring suit to recover unpaid overtime compensation. As stated in *James v. Stockham Valves & Fittings Co.* (5th Cir. 1977) 559 F.2d 310, 358-359, "[t]here is a danger that litigants will be discouraged from bringing such suits because of the risks of protracted litigation and the extended financial drain represented by such a risk. An award of interim attorneys' fees will prevent extreme cash-flow problems for plaintiffs and their attorneys." (See also *Marks v. Clarke* (9th Cir. 1996) 102 F.3d 1012, 1034; *Kayes v. Pacific Lumber Co.* (9th Cir. 1995) 51 F.3d 1449; *Carpenter v. Stephen F. Austin State University* (5th Cir. 1983) 706 F.2d 608, 633.)

The present case, plaintiffs argue, presents a risk of imposing "an extended financial drain" on plaintiffs and their counsel, which would exhaust their resources and thereby defeat the legislative purpose underlying Labor Code section 1194. The record indeed reveals extraordinarily intense and protracted litigation of every step on the way to the orders now on appeal. Since the action was filed on October 2, 1996, plaintiffs' attorneys spent nearly 4,000 hours in litigating a series of seven contested motions before ultimately securing the orders for class certification and summary adjudication. To maintain the litigation, plaintiffs' counsel have been forced to advance costs exceeding $100,000 and to rely on bank loans to defray overhead expenses. The second stage of the litigation could conceivably involve a comparable, or even greater, expenditure of legal effort. FIE filed a status conference statement estimating the length of the trial to be 300 days.

Under these circumstances, the trial court considered that an award of interim fees was required "in order to promote a fair and just outcome" and to address "the mismatch" in financial resources, "exacerbated by the protracted time." We can also see the merit on policy grounds of awarding interim fees in litigation of this kind. American jurisprudence adheres, however, to the rule that each party must bear his or her own attorney fees unless a contractual provision or statute provides otherwise. In the absence of a contractual provision, the right to an award of attorney fees is "purely statutory." (*La Mesa-Spring Valley School Dist. v. Otsuka* (1962) 57 Cal.2d 309, 313 [19 Cal.Rptr. 479, 369 P.2d 7].) As stated in

Code of Civil Procedure section 1021, "Except as attorney's fees are *specifically provided for by statute,* the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. . . . " [Italics added.] Thus, whatever might best serve the legislative purpose of Labor Code section 1194, the propriety of the interim award of attorney fees depends on whether it was "specifically provided for by statute."

"We begin with the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.] In determining such intent '[t]he court turns first to the words themselves for the answer.' [Citation.] We are required to give effect to statutes 'according to the usual, ordinary import of the language employed in framing them.' [Citations.]" (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].) Though the term "to recover" has a range of possible meanings, we think that in the context of a civil action it ordinarily denotes the securing of a judgment. As noted in *Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119 [1 Cal.Rptr.2d 189], the narrower legal sense of the term "recovery" means " 'the obtaining [by judgment] of some right or property which has been taken or withheld from him.' [Citation.]" (*Id.*, at p. 1124.)

We therefore read the phrase "to recover in a civil action the unpaid balance of the full amount of . . . overtime compensation" as referring to a recovery by judgment. (Lab. Code § 1194, subd. (a).) It follows, we think, that the phrase "including interest thereon, reasonable attorney's fees, and costs of suit" has reference to the

existence of such a judgment and refers to items included in that judgment. Indeed, the reference to interest and costs of suit can only refer to items awarded in a judgment. Under the principle of *noscitur a sociis,* the reference to attorney fees should be construed by considering it in the context of the clause as a whole. (*Dyna-Med, Inc. v. Fair Employment & Housing Com., supra,* 43 Cal.3d at p. 1391, fn. 14.) It would be inconsistent with the syntax of the statutory language to construe it as authorizing one kind of prejudgment recovery – attorney fees – and three forms of recovery awarded in a final judgment – unpaid overtime compensation, interest and costs of suit.

The award of interim attorney fees would present peculiar problems in a statute that conditions the right to recover attorney fees on the plaintiff's recovery, and we find nothing in the language of Labor Code section 1194 providing guidance as to when, and under what conditions, an interim fee may be granted. The most plausible explanation is that the Legislature contemplated only an award following final judgment, governed by familiar statutory procedures and rules of court.

Apparently sensing the awkward dilemmas that would be presented by an interim award, the trial court "specifically reserve[d] jurisdiction over the sums awarded to hold future hearings to consider decrease, increase, refund, or costs, as well as any further adjustments, due to matters currently or prospectively on appellate review." But we are reluctant to attribute to the Legislature an intent to authorize an award of interim fees, subject to unrestricted adjustment, and even refund, later in the litigation. Such a process would run counter to the principle that, when differing interpretations are

possible, " '[i]t is the duty of the courts within the framework of the statutes passed by the Legislature, to interpret the statutes so as to make them workable and reasonable.' " (*Regents of University of California v. Superior Court* (1970) 3 Cal.3d 529, 536-537 [91 Cal.Rptr. 57, 476 P.2d 457].)

As the trial court recognized, the present award is subject to a possible need for future adjustments. Plaintiffs point out that, if the order awarding interim attorney fees is affirmed, the decisional underpinning of the order would apply to later stages of the litigation under the doctrine of the law of the case. But it still remains difficult to project the future course of the litigation. The complaint seeks various forms of relief, including an accounting, injunctive relief, and failure to pay compensation upon employee termination, and the answer raises additional affirmative defenses, which may conceivably still be litigated. Moreover, we note that the order granting the interim award did not entail a review of the order for class certification. A reversal or dramatic modification of this order would potentially affect the determination of a reasonable fee.

In cases of this nature, the support for interim attorney fee awards in California decisional law is entirely confined to cases under Code of Civil Procedure section 1021.5. It is true that several cases under that statute have rejected claims that an award was premature, thereby recognizing the existence or prospect of continuing litigation. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 428 [253 Cal.Rptr. 426, 764 P.2d 278]; *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 212 [266 Cal.Rptr. 788]; *Bouvia*

v. County of Los Angeles (1987) 195 Cal.App.3d 1075, 1080, 1086 [241 Cal.Rptr. 239]; *Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 271 [237 Cal.Rptr. 269]; *Bartling v. Glendale Adventist Medical Center* (1986) 184 Cal.App.3d 97, 102 [228 Cal.Rptr. 847].) But unlike federal decisions under civil rights statutes, the California courts have never explicitly addressed the availability of interim fee awards or articulated standards for granting such awards.

The federal decisions authorizing interim attorney fee awards are predicated in large measure on circumstances and legislative history not present here. In *Bradley v. Richmond School Board* (1974) 416 U.S. 696, 723 [94 S.Ct. 2006, 2022, 40 L.Ed.2d 476], the court noted that school desegregation litigation under the Civil Rights Act of 1964 leads to a series of final orders and "[t]o delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel. . . ." Again, in *Hanrahan v. Hampton* (1980) 446 U.S. 754, 756-757 [100 S.Ct. 1987, 1989, 64 L.Ed.2d 670], the court relied on "[t]he legislative history of the Civil Rights Attorney's Fees Awards Act of 1976[, which] indicates that a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.' [Citation.]"

Even if we assume that decisions under Code of Civil Procedure section 1021.5 support the award of interim attorney fee awards, these precedents would be doubtful authority for such awards under Labor Code section 1194. Code of Civil Procedure section 1021.5 authorizes

an award in an action "which has resulted in the enforcement of an important right affecting the public interest. . . . " An interim ruling may vindicate such an important right even if other aspects of the case later go poorly for the plaintiff. In contrast, the language in section 1194, "entitled to recover in a civil action," points to the conclusion of the case.

Apart from the sphere of private attorney general actions under Code of Civil Procedure section 1021.5, the award of interim attorney fees in California remains a wholly untested and novel concept that is ordinarily barred by explicit statutory language. (E.g., *Harrington v. Goldsmith* (1902) 136 Cal. 168 [68 P. 594]; *Southern Cal. Title Clearing Co. v. Laws* (1969) 2 Cal.App.3d 586, 590-591 [83 Cal.Rptr. 8] [construing Civ.Code, former § 796].) Thus, Civil Code section 1717 specifically identifies attorney fees as "an element of the costs" awarded in the final judgment, and the decisional law under the statute has consistently linked the attorney fee award to "the final outcome" (*Bank of Idaho v. Pine Avenue Associates* (1982) 137 Cal.App.3d 5, 15 [186 Cal.Rptr. 695]) or "the final resolution of the merits of the case." (*Liu v. Moore* (1999) 69 Cal.App.4th 745, 755 [81 Cal.Rptr.2d 807].) With this legislative and decisional background, we do not think it is reasonable to construe Labor Code section 1194 as authorizing interim fees in the absence of a clearer expression of legislative intent.

We decline plaintiffs' invitation to base our decision on the larger legislative purpose of Labor Code section 1194. The pertinent issue is whether the statute authorizes an award of interim attorney fees. The syntax of the statute indicates that the Legislature contemplated an

award following a judgment of recovery, concurrent with an award of costs of suit and prejudgment interest. We may not rewrite the statute in ways that are beyond the purview of this expression of legislative intent.

Disposition

The order granting interim payment of attorney fees is reversed. The parties are to bear their own costs on appeal.

Strankman, P.J., and Stein, J., concur.

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 1

ROSE BELL, et al.,
Plaintiff and Respondent,
v.
FARMERS INSURANCE EXCHANGE,
Defendant and Appellant.

A091134
Alameda County No. 7740130A

(FILED MAR. 29, 2001)

BY THE COURT:

The petition for rehearing is denied.

Date: MAR 29 2001 STRANKMAN, A.P.J. P.J.

Court of Appeal, First Appellate District,
Division One – No. A091134
S096772

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ROSE M. BELL et al., Plaintiff and Appellants,

v.

FARMERS INSURANCE EXCHANGE,
Defendant and Appellant.

(Filed Jun. 20, 2001)

Petition for review DENIED.

Baxter, J., and Brown, J., are of the opinion the petition should be granted.

The request for an order directing depublication of the opinion is denied.

GEORGE
Chief Justice

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BEFORE THE HONORABLE MARK L. EATON, JUDGE

DEPARTMENT 5

ROSE M. BELL, LOREN D. MITCHELL, RACHEL POESCHEL, WYRN ANDERSON, JOSEPH C. KOKAISL, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

FARMERS INSURANCE COMPANY, INC., FARMERS INSURANCE EXCHANGE, A CALIFORNIA RECIPROCAL OR INTER-INSURANCE EXCHANGE, and Does 2 through 100, inclusive,

Defendants.

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Case No. 774013-0
Class Action

(FILED APR. 21, 1999)

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION, DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO CLAIMS BY SUBCLASS OF LIABILITY CLAIMS REPRESENTATIVES AGAINST FARMERS INSURANCE EXCHANGE, AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO ALL CLAIMS AGAINST FARMERS INSURANCE COMPANY, INC.

Plaintiffs' motion for summary adjudication and Defendants' motion for summary judgment both came for hearing on March 10, 1999, at 2:00 p.m. in Department No. 5, Hon. Mark Eaton, Judge presiding. Steven G. Zieff and Marcie E. Bernan appeared as attorneys for Plaintiffs and Lee T. Paterson appeared as attorney for Defendants.

The Court has considered the parties' objections to evidence and considered only evidence admissible and relevant and disregarded inadmissible evidence. *Biliac Assoc. v. First Interstate Bank*, (1990) 218 Cal.App.3d 410. After full consideration of the evidence, and the separate statements submitted by each party, and the authorities submitted by counsel, as well as oral argument by counsel, the court orders as follows:

1. Defendants' Motion for Summary Judgment is GRANTED with respect to Farmers Insurance Company, Inc. as to all causes of action. The Court finds that, as a matter of law, the class of individuals represented by plaintiffs are not employees of the Farmers Insurance Company, Inc.

2. Plaintiffs' motion for summary adjudication is GRANTED as to Defendant Farmers Insurance Exchange's fourth affirmative defense, i.e., whether all three subclasses of Personal Lines Claims Representatives employed by Farmers Insurance Exchange ("FIE") are *bona fide* "administrators" exempt from overtime pay. For the reasons set forth below, the court finds there is no triable issue of material fact as to this issue, and finds that, as a matter of law, this class of Personal Lines Claims Representatives

employed by FIE does not fall within the "administrative" overtime exemption in that they are not engaged in bona fide "administrative" activities within the meaning of the "administrative" exemption under California wage and hour law, but, rather, are engaged in non-exempt "production" work.

3. Defendants' Motion for Summary Judgment is DENIED with respect to the issue of whether the subclass of liability Claims Representatives employed by FIE are exempt "administrative" employees rather than non-exempt "production" workers for the reasons set forth below.

Overtime pay requirements and exemptions therefrom are established pursuant to Wage Order 4, 8 Cal. Code Regs. § 11040, entitled as applying to "Professional, Technical, Clerical, Mechanical and Similar Occupations." Wage Order No. 4 exempts from its coverage "persons employed in administrative, executive, or professional capacities." Wage Order 4, § 1(A).

Construction of statutory and regulatory terms may properly be guided by reference to parallel federal statutes, and terms with a well-established legal meaning are appropriately construed in accordance therewith.[1] California's overtime exemptions are "patterned on" those set

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[1] *Building Material & Construction Teamsters' Union Local 216 v. Farrell* (1986) 41 Cal.3d 651, 658, n. 2 (even where language in analogous federal statute is not identical to that of California provision, "[f]ederal decisions have frequently guided our interpretation of state labor provisions"); *ACLU v. Deukmejian* (1982) 32 Cal. 3d 440, 449, 451 (court refers to federal Freedom of Information Act on which California Public Records Act "was modeled" to guide construction of "intelligence information"

forth in the federal Fair Labor Standards Act (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal. App. 4th 555, 562) which, likewise, exempts from its overtime pay requirements employees in an "executive, administrative or professional capacity." 29 U.S.C. § 213(a)(1). The meaning of these terms is well-established via detailed federal regulations (29 C.F.R. §§ 541.2) and interpretive regulations (29 C.F.R. §§ 541.201 et seq.) and numerous court cases construing such (*see, e.g., Dalheim v. KDFW-TV* (5th Cir. 1990) 918 F.2d 1220) and cases cited *infra* at pp. 4-5. It is appropriate to construe the term "administrative" as used in Wage Order No. 4 by reference to federal overtime law, which includes within the ambit of "administrative" only duties "*directly related to management policies or general business operations*" as distinguished from non-exempt "*production*" type work. 29 C.F.R. §§ 541.2(a)(1), 541.205(c). Numerous cases have approved this construction. As explained in *Dalheim v. KDFW-TV, supra*:

> [The "administrative/production" distinction expressed in 541.205(c)] is between those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market."

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exemption; because the purpose of the federal act "corresponds to the purpose of the California Act, we believe the two statutes should receive a parallel construction"); *Arnett v. Cicio* (1996) 14 Cal. 4th 4, 19, 20 ("[W]hen a word used in a statute [or regulation] has a well-established legal meaning . . . the lawmakers are presumed to have used the word in its specifically legal sense.").

Dalheim v. KDFW-TV, supra, at 1230-1231. "Administrative" employees are those who participate in "running the business" while, on the other hand, employees functioning in a "production" capacity are those who do not *run* the business but who, instead, *carry out* the business; "production" employees do not *set* company policy but, instead, *apply* the company's policies, on a day-to-day basis. *Fleming v. Carpenters/Contractors Cooperation Committee* (S.D. Cal. 1993) 834 F.Supp. 323, 328; *Reich v. Chicago Title Ins. Co.* (D. Kan. 1994) 853 F.Supp. 1325, 1331; *Bratt v. County of Los Angeles* (9th Cir. 1990) 912 F.2d 1066, 1070, *cert. den.* 498 U.S 1086 (1991). Thus, numerous courts have deemed as non-exempt "production" employees various types of white collar employees who provide the very services their employer "exists to produce and market." *See, e.g., Gusdonovich v. Business Information Co.* (W.D.Pa. 1985) 705 F.Supp. 321 (insurance claims investigator employed by insurance claims investigating company held to be employed in a non-exempt "production" capacity; summary judgment granted to plaintiff); *Reich v. American Int'l Adjustment Company, Inc.* (D. Conn. 1994) 902 F.Supp. 321 (D. Conn. 1994) (auto claims appraisers employed by insurance claims adjusting company held to be employed in a non-exempt "production" capacity; Summary Judgment granted to Plaintiffs).

As Defendant FIE acknowledged at the hearing on this matter and in its reply brief in support of its cross Motion for Summary Judgment on this same issue, the facts material to resolution of this issue are not in dispute. The undisputed evidence reflects the following: FIE is an insurance company which as its main function

adjusts claims on its own behalf and, also, on behalf of other "Farmers Insurance Group of Companies" affiliated insurers which pay FIE for this claims adjusting service. The class members represented by Plaintiffs, who comprise FIE's complement of "Personal Lines" Claims Representatives, carry out FIE's claims adjusting function. Other FIE personnel, not Personal Lines Claims Representatives, devise company policy and procedure, set budgets, determine staffing levels, and make decisions about purchasing, facilities and equipment. FIE outsources to a different entity, Farmers Group, Inc. everything having to do with the design and marketing of FIE insurance policies and oversees the agency force that sells FIE's insurance policies, and outsources the management of various additional insurance company functions other than claims adjusting.

Based on these facts, the Court finds that there is no triable controversy and that claims adjusting is a product or service which FIE's operation exists to provide. It is further found that the Personal Lines Claims Representatives devote their time to carrying out FIE's claims adjusting product/service as opposed to its "administrative" functions. Therefore, as a matter of law, these Personal Lines Claims Representatives (auto physical damage, property and liability Claims Representatives) do not fall within the ambit of the "administrative" exemption from overtime in Wage Order No. 4.

IT IS THEREFORE ORDERED that Plaintiffs' motion for summary adjudication is granted and that the final judgment in this action shall, in addition to any other matters determined at trial, award judgment in accordance with the matters so adjudicated.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment with respect to the status of the subclass of liability Claims Representatives as exempt "administrative" as opposed to nonexempt "production" employees is DENIED as a matter of law.

IT IS FURTHER ORDERED that the Defendants' motion as to all claims against Farmers Insurance Company, Inc. is GRANTED on the grounds that there is no triable issue of material fact as to whether the Farmers Insurance Company, Inc. employed the members of the Plaintiffs' class.

Dated: APR 21 1999 /s/ Mark L. Eaton
Judge of the Superior Court

29 C.F.R. Sec. 541.2 Administrative.

The term employee employed in a bona fide * * * administrative * * * capacity in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not

directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week ($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week ($200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section. [38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

Effective Date Note: Paragraph (e) in Sec. 541.2 was revised at 46 FR 3013, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (e) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

Sec. 541.2 Administrative.

* * *

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 ($180 per week beginning February 13, 1981 and $200 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 ($260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion

and independent judgment, shall be deemed to meet all the requirements of this section.

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29 C.F.R. Sec. 541.108 Work directly and closely related.

(a) This phrase brings within the category of exempt work not only the actual management of the department and the supervision of the employees therein, but also activities which are closely associated with the performance of the duties involved in such managerial and supervisory functions or responsibilities. The supervision of employees and the management of a department include a great many directly and closely related tasks which are different from the work performed by subordinates and are commonly performed by supervisors because they are helpful in supervising the employees or contribute to the smooth functioning of the department for which they are responsible. Frequently such exempt work is of a kind which in establishments that are organized differently or which are larger and have greater specialization of function, may be performed by a nonexempt employee hired especially for that purpose. Illustration will serve to make clear the meaning to be given the phrase "directly and closely related".

(b) Keeping basic records of working time, for example, is frequently performed by a timekeeper employed for that purpose. In such cases the work is clearly not exempt in nature. In other establishments which are not large enough to employ a timekeeper, or in which the timekeeping function has been decentralized,

the supervisor of each department keeps the basic time records of his own subordinates. In these instances, as indicated above, the timekeeping is directly related to the function of managing the particular department and supervising its employees. However, the preparation of a payroll by a supervisor, even the payroll of the employees under his supervision, cannot be considered to be exempt work, since the preparation of a payroll does not aid in the supervision of the employees or the management of the department. Similarly, the keeping by a supervisor of production or sales records of his own subordinates for use in supervision or control would be exempt work, while the maintenance of production records of employees not under his direction would not be exempt work.

(c) Another example of work which may be directly and closely related to the performance of management duties is the distribution of materials or merchandise and supplies. Maintaining control of the flow of materials or merchandise and supplies in a department is ordinarily a responsibility of the managerial employee in charge. In many nonmercantile establishments the actual distribution of materials is performed by nonexempt employees under the supervisor's direction. In other establishments it is not uncommon to leave the actual distribution of materials and supplies in the hands of the supervisor. In such cases it is exempt work since it is directly and closely related to the managerial responsibility of maintaining the flow of materials. In a large retail establishment, however, where the replenishing of stocks of merchandise on the sales floor is customarily assigned to a nonexempt employee, the performance of such work by

the manager or buyer of the department is nonexempt. The amount of time the manager or buyer spends in such work must be offset against the statutory tolerance for nonexempt work. The supervision and control of a flow of merchandise to the sales floor, of course, is directly and closely related to the managerial responsibility of the manger or buyer.

(d) Setup work is another illustration of work which may be exempt under certain circumstances if performed by a supervisor. The nature of setup work differs in various industries and for different operations. Some setup work is typically performed by the same employees who perform the "production" work; that is, the employee who operates the machine also "sets it up" or adjusts it for the particular job at hand. Such setup work is part of the production operation and is not exempt. In other instances the setting up of the work is a highly skilled operation which the ordinary production worker or machine tender typically does not perform. In some plants, particularly large ones, such setup work may be performed by employees whose duties are not supervisory in nature. In other plants, however, particularly small plants, such work is a regular duty of the executive and is directly and closely related to his responsibility for the work performance of his subordinates and for the adequacy of the final product. Under such circumstances it is exempt work. In the data processing field the work of a supervisor when he performs the more complex or more responsible work in a program utilizing several computer programmers or computer operators would be exempt activity.

(e) Similarly, a supervisor who spot checks and examines the work of his subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to his managerial and supervisory functions. However, this kind of examining and checking must be distinguished from the kind which is normally performed by an "examiner," "checker," or "inspector," and which is really a production operation rather than a part of the supervisory function. Likewise, a department manager or buyer in a retail or service establishment who goes about the sales floor observing the work of sales personnel under his supervision to determine the effectiveness of their sales techniques, checking on the quality of customer service being given, or observing customer preference and reactions to the lines, styles, types, colors, and quality of the merchandise offered, is performing work which is directly and closely related to his managerial and supervisory functions. His actual participation, except for supervisory training or demonstration purposes, in such activities as making sales to customers, replenishing stocks of merchandise on the sales floor, removing merchandise from fitting rooms and returning to stock or shelves, however, is not. The amount of time a manager or buyer spends in the performance of such activities must be included in computing the percentage limitation on nonexempt work.

(f) Watching machines is another duty which may be exempt when performed by a supervisor under proper circumstances. Obviously the mere watching of machines in operation cannot be considered exempt work where, as in certain industries in which the machinery is largely

automatic, it is an ordinary production function. Thus, an employee who watches machines for the purpose of seeing that they operate properly or for the purpose of making repairs or adjustments is performing nonexempt work. On the other hand, a supervisor who watches the operation of the machinery in his department in the sense that he "keeps an eye out for trouble" is performing work which is directly and closely related to his managerial responsibilities. Making an occasional adjustment in the machinery under such circumstances is also exempt work.

(g) A word of caution is necessary in connection with these illustrations. The recordkeeping, material distributing, setup work, machine watching and adjusting, and inspecting, examining, observing, and checking referred to in the examples of exempt work are presumably the kind which are supervisory and managerial functions rather than merely "production" work. Frequently it is difficult to distinguish the managerial type from the type which is a production operation. In deciding such difficult cases it should be borne in mind that it is one of the objectives of Sec. 541.1 to exclude from the definition foremen who hold "dual" or combination jobs. (See discussion of working foremen in Sec. 541.115.) Thus, if work of this kind takes up a large part of the employee's time it would be evidence that management of the department is not the primary duty of the employee, that such work is a production operation rather than a function directly and closely related to the supervisory or managerial duties, and that the employee is in reality a combination foreman – "setup" man, foreman-machine

adjuster (or mechanic), or foreman-examiner, floorman-salesperson, etc., rather than a bona fide executive.

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29 C.F.R. Sec. 541.202 Categories of Work.

(a) The work generally performed by employees who perform administrative tasks may be classified into the following general categories for purposes of the definition: (This classification is without regard to whether the work is manual or nonmanual. The problem of manual work as it affects the exemption of administrative employees is discussed in Sec. 541.203.) (1) The work specifically described in paragraphs (a), (b), and (c) of Sec. 541.2; (2) routine work which is directly and closely related to the performance of the work which is described in paragraphs (a), (b), and (c) of Sec. 541.2; and (3) routine work which is not related or is only remotely related to the administrative duties. (As used in this subpart the phrase "routine work" means work which does not require the exercise of discretion and independent judgment. It is not necessarily restricted to work which is repetitive in nature.)

(b) The work in category 1, that which is specifically described in Sec. 541.2 as requiring the exercise of discretion and independent judgment, is clearly exempt in nature.

(c) Category 2 consists of work which if separated from the work in category 1 would appear to be routine, or on a fairly low level, and which does not itself require the exercise of discretion and independent judgment, but

which has a direct and close relationship to the performance of the more important duties. The directness and closeness of the relationship may vary depending upon the nature of the job and the size and organization of the establishment in which the work is performed. This "directly and closely related" work includes routine work which necessarily arises out of the administrative duties, and the routine work without which the employee's more important work cannot be performed properly. It also includes a variety of routine tasks which may not be essential to the proper performance of the more important duties but which are functionally related to them directly and closely. In this latter category are activities which an administrative employee may reasonably be expected to perform in connection with carrying out his administrative functions including duties which either facilitate or arise incidentally from the performance of such functions and are commonly performed in connection with them.

(d) These "directly and closely related" duties are distinguishable from the last group, category 3, those which are remotely related or completely unrelated to the more important tasks. The work in this last category is nonexempt and must not exceed the 20-percent limitation for nonexempt work (up to 40 percent of service establishment) if the exemption is to apply.

(3) Work performed by employees in the capacity of "academic administrative" personnel is a category of administrative work limited to a class of employees engaged in academic administration as contrasted with the general usable of "administrative" in the act. The term "academic administrative" denotes administration

relating to the academic operations and functions in a school rather than to administration along the lines of general business operations. Academic administrative personnel are performing operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration. Examples of jobs in school systems, and educational establishments and institutions, which are outside the term academic administration are jobs relating to building management and maintenance, jobs relating to the health of the students and academic staff such as social workers, psychologist, lunch room manager, or dietitian. Employees in such work which is not considered academic administration may qualify for exemption under other provisions of Sec. 541.2 or under other sections of the regulations in subpart A of this part provided the requirements for such exemptions are met.

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29 C.F.R. Sec. 541.205 Directly related to management policies or general business operations.

(a) The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

(b) The administrative operations of the business include the work performed by so-called white-collar employees engaged in "servicing" a business as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. An employee performing such work is engaged in activities relating to the administrative operations of the business notwithstanding that he is employed as an administrative assistant to an executive in the production department of the business.

(c) As used to describe work of substantial importance to the management or operation of the business, the phrase "directly related to management policies or general business operations" is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those [sic] work affects policy or whose responsibility it is to execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.

(1) It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business. It should be clear that the cashier of a bank performs work at a responsible level and may therefore be said to be performing work directly related

to management policies or general business operations. On the other hand, the bank teller does not. Likewise it is clear that bookkeepers, secretaries, and clerks of various kinds hold the run-of-the-mine [sic] positions in any ordinary business and are not performing work directly related to management policies or general business operations. On the other hand, a tax consultant employed either by an individual company or by a firm of consultants is ordinarily doing work of substantial importance to the management or operation of a business.

(2) An employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the matter in which he performs his clerical tasks. A messenger boy who is entrusted with carrying large sums of money or securities cannot be said to be doing work of importance to the business even though serious consequences may flow from his neglect. An employee operating very expensive equipment may cause serious loss to his employer by the improper performance of his duties. An inspector, such as, for example, an inspector for an insurance company, may cause loss to his employer by the failure to perform his job properly. But such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be "directly related to management policies or general business operations" as that phrase is used in Sec. 541.2.

(3) Some firms employ persons whom they describe as "statisticians." If all such a person does, in effect, is to tabulate data, he is clearly not exempt. However, if such

an employee makes analyses of data and draws conclusions which are important to the determination of, or which, in fact, determine financial, merchandising, or other policy, clearly he is doing work directly related to management policies or general business operations. Similarly, a personnel employee may be a clerk at a hiring window of a plant, or he may be a man who determines or effects personnel policies affecting all the workers in the establishment. In the latter case, he is clearly doing work directly related to management policies or general business operations. These examples illustrate the two extremes. In each case, between these extreme types there are many employees whose work may be of substantial importance to the management or operation of the business, depending upon the particular facts.

(4) Another example of an employee whose work may be important to the welfare of the business is a buyer of a particular article or equipment in an industrial plant or personnel commonly called assistant buyers in retail or service establishments. Where such work is of substantial importance to the management or operation of the business, even though it may be limited to purchasing for a particular department of the business, it is directly related to management policies or general business operations.

(5) The test "directly related to management policies or general business operations" is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, claim agents and adjusters, wage-rate analysts, tax experts, account executives of advertising agencies, customers'

brokers in stock exchange firms, promotion men, and many others.

(6) It should be noted in this connection that an employer's volume of activities may make it necessary to employ a number of employees in some of these categories. The fact that there are a number of other employees of the same employer carrying out assignments of the same relative importance or performing identical work does not affect the determination of whether they meet this test so long as the work of each such employee is of substantial importance to the management or operation of the business.

(7) In the data processing field some firms employ persons described as systems analysts and computer programers. If such employees are concerned with the planning, scheduling, and coordination of activities which are required to develop systems for processing data to obtain solutions to complex business, scientific, or engineering problems of his employer or his employer's customers, he is clearly doing work directly related to management policies or general business operations.

(d) Under Sec. 541.2 the "management policies or general business operations" may be those of the employer or the employer's customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers. Such employees, if they meet

the other requirements of Sec. 541.2, qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer.

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29 C.F.R. Sec. 541.207 Discretion and independent judgment.

(a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term as used in the regulations in subpart A of this part, moreover, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. (Without actually attempting to define the term, the courts have given it this meaning in applying it in particular cases. See, for example, *Walling v. Sterling Ice Co.*, 69 F. Supp. 655, reversed on other grounds, 165 F. (2d) 265 (CCA 10). See also *Connell v. Delaware Aircraft Industries*, 55 Atl. (2d) 637.)

(b) The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. It has been most frequently misunderstood and misapplied by employers and employees in cases involving the following: (1) Confusion

between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards; and (2) misapplication of the term to employees making decisions relating to matters of little consequence.

(c) Distinguished from skills and procedures:

(1) Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment within the meaning of Sec. 541.2. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard.

(2) A typical example of the application of skills and procedures is ordinary inspection work of various kinds. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been cataloged and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They may have some leeway in the performance of their work but only within closely prescribed limits. Employees of this type may make recommendations on the basis of the information they

develop in the course of their inspections (as for example, to accept or reject an insurance risk or a product manufactured to specifications), but these recommendations are based on the development of the facts as to whether there is conformity with the prescribed standards. In such cases a decision to depart from the prescribed standards or the permitted tolerance is typically made by the inspector's superior. The inspector is engaged in exercising skill rather than discretion and independent judgment within the meaning of the regulations in Subpart A of this part.

(3) A related group of employees usually called examiners or graders perform similar work involving the comparison of products with established standards which are frequently cataloged. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for the manual of standards does not convert the character of the work performed to work requiring the exercise of discretion and independent judgment as required by the regulations in subpart A of this part. The mere fact that the employee uses his knowledge and experience does not change his decision, i.e., that the product does or does not conform with the established standard, into a real decision in a significant matter.

(4) For example, certain "graders" of lumber turn over each "stick" to see both sides, after which a crayon mark is made to indicate the grade. These lumber grades are well established and the employee's familiarity with them stems from his experience and training. Skill rather

than discretion and independent judgment is exercised in grading the lumber. This does not necessarily mean, however, that all employees who grade lumber or other commodities are not exercising discretion and independent judgment. Grading of commodities for which there are no recognized or established standards may require the exercise of discretion and independent judgment as contemplated by the regulations in subpart A of this part. In addition, in those situations in which an otherwise exempt buyer does grading, the grading even though routine work, may be considered exempt if it is directly and closely related to the exempt buying.

(5) Another type of situation where skill in the application of techniques and procedures is sometimes confused with discretion and independent judgment is the "screening" of applicants by a personnel clerk. Typically such an employee will interview applicants and obtain from them data regarding their qualifications and fitness for employment. These data may be entered on a form specially prepared for the purpose. The "screening" operation consists of rejecting all applicants who do not meet standards for the particular job or for employment by the company. The standards are usually set by the employee's superior or other company officials, and the decision to hire from the group of applicants who do meet the standards is similarly made by other company officials. It seems clear that such a personnel clerk does not exercise discretion and independent judgment as required by the regulations in subpart A of this part. On the other hand an exempt personnel manager will often

perform similar functions; that is, he will interview applicants to obtain the necessary data and eliminate applicants who are not qualified. The personnel manager will then hire one of the qualified applicants. Thus, when the interviewing and screening are performed by the personnel manager who does the hiring they constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(6) Similarly, comparison shopping performed by an employee of a retail store who merely reports to the buyer his findings as to the prices at which a competitors' store is offering merchandise of the same or comparable quality does not involve the exercise of discretion and judgment as required in the regulations. Discretion and judgment are exercised, however, by the buyer who evaluates the assistants' reports and on the basis of their findings directs that certain items be re-priced. When performed by the buyer who actually makes the decisions which affect the buying or pricing policies of the department he manages, the comparison shopping, although in itself a comparatively routine operation, is directly and closely related to his managerial responsibility.

(7) In the data processing field a systems analyst is exercising discretion and independent judgment when he develops methods to process, for example, accounting, inventory, sales, and other business information by using electronic computers. He also exercises discretion and independent judgment when he determines the exact nature of the data processing problem, and structures the problem in a logical manner so that a system to solve the problem and obtain the desired results can be developed. Whether a computer programer is exercising discretion

and independent judgment depends on the facts in each particular case. Every problem processed in a computer first must be carefully analyzed so that exact and logical steps for its solution can be worked out. When this preliminary work is done by a computer programer he is exercising discretion and independent judgment. A computer programer would also be using discretion and independent judgment when he determines exactly what information must be used to prepare the necessary documents and by ascertaining the exact form in which the information is to be presented. Examples of work not requiring the level of discretion and judgment contemplated by the regulations are highly technical and mechanical operations such as the preparation of a flow chart or diagram showing the order in which the computer must perform each operation, the preparation of instructions to the console operator who runs the computer or the actual running of the computer by the programmer, and the debugging of a program. It is clear that the duties of data processing employees such as tape librarians, keypunch operators, computer operators, junior programers and programer trainees are so closely supervised as to preclude the use of the required discretion and independent judgment.

(d) Decisions in significant matters. (1) The second type of situation in which some difficulty with this phrase has been experienced relates to the level or importance of the matters with respect to which the employee may make decisions. In one sense almost every employee is required to use some discretion and independent judgment. Thus, it is frequently left to a truckdriver to decide which route to follow in going from one place to another;

the shipping clerk is normally permitted to decide the method of packing and the mode of shipment of small orders; and the bookkeeper may usually decide whether he will post first to one ledger rather than another. Yet it is obvious that these decisions do not constitute the exercise of discretion and independent judgment of the level contemplated by the regulations in subpart A of this part. The divisions have consistently taken the position that decisions of this nature concerning relatively unimportant matters are not those intended by the regulations in subpart A of this part, but that the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence. This interpretation has also been followed by courts in decisions involving the application of the regulations in this part, to particular cases.

(2) It is not possible to state a general rule which will distinguish in each of the many thousands of possible factual situations between the making of real decisions in significant matters and the making of choices involving matters of little or no consequence. It should be clear, however, that the term "discretion and independent judgment," within the meaning of the regulations in subpart A of this part, does not apply to the kinds of decisions normally made by clerical and similar types of employees. The term does apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise. The regulations in subpart A of

this part, however, do not require the exercise of discretion and independent judgment at so high a level. The regulations in subpart A of this part also contemplate the kind of discretion and independent judgment exercised by an administrative assistant to an executive, who without specific instructions or prescribed procedures, arranges interviews and meetings, and handles callers and meetings himself where the executive's personal attention is not required. It includes the kind of discretion and independent judgment exercised by a customer's man in a brokerage house in deciding what recommendations to make to a customer for the purchase of securities. It may include the kind of discretion and judgment exercised by buyers, certain wholesale salesman, representatives, and other contact persons who are given reasonable latitude in carrying on negotiation on behalf of their employers.

(e) Final decisions not necessary. (1) The term "discretion and independent judgment" as used in the regulations in subpart A of this part does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment within the meaning of the regulations in subpart A of this part. For example, the assistant to the president of a large corporation may regularly

reply to correspondence addressed to the president. Typically, such an assistant will submit the more important replies to the president for review before they are sent out. Upon occasion, after review, the president may alter or discard the prepared reply and direct that another be sent instead. This section by the president would not, however, destroy the exempt character of the assistant's function, and does not mean that he does not exercise discretion and independent judgment in answering correspondence and in deciding which replies may be sent out without review by the president.

(2) The policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization, may have the plan reviewed or revised by his superiors before it is submitted to the client. The purchasing agent may be required to consult with top management officials before making a purchase commitment for raw materials in excess of the contemplated plant needs for a stated period, say 6 months. These employees exercise discretion and independent judgment within the meaning of the regulations despite the fact that their decisions or recommendations are reviewed at a higher level.

(f) Distinguished from loss through neglect. A distinction must also be made between the exercise of discretion and independent judgment with respect to matters of consequence and the cases where serious consequences may result from the negligence of an employee, the failure to follow instruction or procedures,

the improper application of skills, or the choice of the wrong techniques. The operator of a very intricate piece of machinery, for example, may cause a complete stoppage of production or a breakdown of his very expensive machine merely by pressing the wrong button. A bank teller who is engaged in receipt and disbursement of money at a teller's window and in related routine bookkeeping duties may, by crediting the wrong account with a deposit, cause his employer to suffer a large financial loss. An inspector charged with responsibility for loading oil onto a ship may, by not applying correct techniques fail to notice the presence of foreign ingredients in the tank with resulting contamination of the cargo and serious loss to his employer. In these cases, the work of the employee does not require the exercise of discretion and independent judgment within the meaning of the regulations in subpart A of this part.

(g) Customarily and regularly. The work of an exempt administrative employee must require the exercise of discretion and independent judgment customarily and regularly. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretion and independent judgment in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretion and independent judgment.

INDUSTRIAL WELFARE COMMISSION

ORDER. NO. 4-2001

REGULATING

WAGES, HOURS AND WORKING CONDITIONS IN THE PROFESSIONAL, TECHNICAL, CLERICAL, MECHANICAL AND SIMILAR OCCUPATIONS

(Effective January 1, 2001 as amended)

1. Applicability of Order. This order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis, except that:

(A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. The following requirements shall apply in determining whether an employee's duties meet the test to qualify for an exemption from those sections:

(1) Executive Exemption. A person employed in an executive capacity means any employee:

(a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the

hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretion and independent judgment; and

(e) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(f) Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-

time employment is defined in Labor Code Section 515(c) as 40 hours per week.

(2) Administrative Exemption. A person employed in an administrative capacity means any employee:

(a) Whose duties and responsibilities involve either:

(i) The performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his/her employer"s customers; or

(ii) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section); or

(d) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or

(e) Who executes under only general supervision special assignments and tasks; and

(f) Who is primarily engaged in duties that meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(g) Such employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.

(3) Professional Exemption. A person employed in a professional capacity means

any employee who meets *all* of the following requirements:

(a) Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or

(b) Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession. For the purposes of this subsection, "learned or artistic profession" means an employee who is primarily engaged in the performance of:

(i) Work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part of or necessarily incident to any of the above work; or

(ii) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of

which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work; and

(iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(c) Who customarily and regularly exercises discretion and independent judgment in the performance of duties set forth in subparagraphs (a) and (b).

(d) Who earns a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515 (c) as 40 hours per week.

(e) Subparagraph (b) above is intended to be construed in accordance with the following provisions of federal law as they existed as of the date of this wage order: 29 C.F.R. Sections 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, and 541.310.

(f) Notwithstanding the provisions of this subparagraph, pharmacists employed to engage in the practice of pharmacy, and registered nurses

employed to engage in the practice of nursing, shall not be considered exempt professional employees, nor shall they be considered exempt from coverage for the purposes of this subparagraph unless they individually meet the criteria established for exemption as executive or administrative employees.

(g) Subparagraph (f) above shall not apply to the following advanced practice nurses:

(i) Certified nurse midwives who are primarily engaged in performing duties for which certification is required pursuant to Article 2.5 (commencing with Section 2746) of Chapter 6 of Division 2 of the Business and Professions Code.

(ii) Certified nurse anesthetists who are primarily engaged in performing duties for which certification is required pursuant to Article 7 (commencing with Section 2825) of Chapter 6 of Division 2 of the Business and Professions Code.

(iii) Certified nurse practitioners who are primarily engaged in performing duties for which certification is required pursuant to Article 8 (commencing with Section 2834) of Chapter 6 of Division 2 of the Business and Professions Code.

(iv) Nothing in this subparagraph shall exempt the occupations set forth in clauses (i), (ii), and (iii)

from meeting the requirements of subsection 1(A)(3)(a)-(d), above.

(h) Except as provided in subparagraph (i), an employee in the computer software field who is paid on an hourly basis shall be exempt, if *all* of the following apply:

(i) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment.

(ii) The employee is primarily engaged in duties that consist of one or more of the following:

– The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.

– The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

– The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

(iii) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of the applicability of this exemption.

(iv) The employee's hourly rate of pay is not less than forty-one dollars ($41.00). The Division of Labor Statistics and Research shall adjust this pay rate on October 1 of each year to be effective on January 1 of the following year by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.

(i) The exemption provided in subparagraph (h) does not apply to an employee if *any* of the following apply:

(i) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(ii) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(iii) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

(iv) The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

(v) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for on screen media or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

(vi) The employee is engaged in *any* of the activities set forth in subparagraph (h) for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

(B) Except as provided in Sections 1, 2, 4, 10, and 20, the provisions of this order shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district.

(C) The provisions of this order shall not apply to outside salespersons.

(D) The provisions of this order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

(E) The provisions of this order shall not apply to any individual participating in a national service program, such as AmeriCorps, carried out using assistance provided under Section 12571 of Title 42 of the United States Code. (See Stats. 2000, ch. 365, amending Labor Code Section 1171.)

2. **Definitions.**

(A) An "alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period.

(B) "Commission" means the Industrial Welfare Commission of the State of California.

(C) "Division" means the Division of Labor Standards Enforcement of the State of California.

(D) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(E) "Employ" means to engage, suffer, or permit to work.

(F) "Employee" means any person employed by an employer.

(G) "Employees in the Health care industry" means any of the following:

(1) Employees in the health care industry providing patient care; or

(2) Employees in the health care industry working in a clinical or medical department, including pharmacists dispensing prescriptions in any practice setting; or

(3) Employees in the health care industry working primarily or regularly as a member of a patient care delivery team; or

(4) Licensed veterinarians, registered veterinary technicians and unregistered animal health technicians providing patient care.

(H) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(I) "Health care emergency" consists of an unpredictable or unavoidable occurrence at unscheduled intervals relating to health care delivery, requiring immediate action.

(J) "Health care industry" is defined as hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, home health agencies, clinics operating 24 hours per day, and clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology or dialysis.

(K) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so. Within the

health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act.

(L) "Minor" means, for the purpose of this order, any person under the age of 18 years.

(M) "Outside salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(N) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(O) "Professional, Technical, Clerical, Mechanical, and Similar Occupations" includes professional, semiprofessional, managerial, supervisorial, laboratory, research, technical, clerical, office work, and mechanical occupations. Said occupations shall include, but not be limited to, the following: accountants; agents; appraisers; artists; attendants; audio-visual technicians; bookkeepers; bundlers; billposters; canvassers; carriers; cashiers; checkers; clerks; collectors; communications and sound technicians; compilers; copy holders; copy readers; copy writers; computer programmers and operators; demonstrators and display representatives; dispatchers; distributors; door-keepers; drafters; elevator operators; estimators; editors; graphic

arts technicians; guards; guides; hosts; inspectors; installers; instructors; interviewers; investigators; librarians; laboratory workers; machine operators; mechanics; mailers; messengers; medical and dental technicians and tech nologists; models; nurses; packagers; photographers; porters and cleaners; process servers; printers; proof readers; salespersons and sales agents; secretaries; sign erectors; sign painters; social workers; solicitors; statisticians; stenographers; teachers; telephone, radio-telephone, telegraph and call-out operators; tellers; ticket agents; tracers; typists; vehicle operators; x-ray technicians; their assistants and other related occupations listed as professional, semi-professional, technical, clerical, mechanical, and kindred occupations.

(P) "Shift" means designated hours of work by an employee, with a designated beginning time and quitting time.

(Q) "Split shift" means a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(R) "Teaching" means, for the purpose of Section 1 of this order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(S) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.

(T) "Workday" and "day" mean any consecutive 24-hour period beginning at the same time each calendar day.

(U) "Workweek" and "week" mean any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

* * *

Supreme Court, U.S.
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No. 01-485

IN THE

Supreme Court of the United States

FARMERS INSURANCE EXCHANGE,
Petitioner,

v.

ROSE M. BELL, LOREN D. MITCHELL, RACHEL POESCHEL, WYNN ANDERSON AND JOSEPH C. KOKAISL, individually and on behalf of others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the claims representatives employed by petitioner insurance company's Personal Lines division were "administrative" employees within the meaning of the former, superceded version of California Industrial Welfare Commission Wage Order 4, and therefore not entitled under California law (California Labor Code §1194) to premium pay for the overtime work they performed.

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IN THE

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FARMERS INSURANCE EXCHANGE,
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On Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. A1-A46) is reported at 105 Cal.Rptr. 59. The order of the Court of Appeal denying rehearing (Pet. App. 47) and the order of the California Supreme Court denying review (Pet. App. 48) are unreported. The pertinent summary adjudication order of the Alameda County Superior Court (Pet. App. 49-55) is unreported.

JURISDICTION

The California Supreme Court denied review on June 20, 2001. The petition for certiorari was filed on September 20, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). The Court lacks jurisdiction, however, because of the absence of a substantial federal question.

STATUTES AND OTHER MATERIALS

This case involves the superceded version of Wage Order 4 of the California Industrial Welfare Commission that was in effect prior to October 1, 2000, not the current version of Wage Order 4 set out in the Appendix to the Petition for Certiorari. The pertinent parts of the applicable wage order are set out in an Appendix to this Brief in Opposition (Res. App. 1a-16a).

STATEMENT

1. Overview.

Pursuant to California Labor Code §1194, the California Industrial Welfare Commission ("IWC") has adopted a series of wage orders requiring employers in California to pay their workers a premium rate for daily and weekly overtime work. Respondents are a class of about 2,400 Personal Lines claims representatives employed by petitioner Farmers Insurance Exchange ("FIE") in California. In October 1996, respondents brought suit against FIE in the Alameda County Superior Court for nonpayment of overtime compensation required by the applicable state wage order—the now-superceded version of Wage Order 4 in effect prior to October 1, 2000. Pet. 3; Pet. App. 16-17.

Wage Order 4 contained an exemption from state law overtime protections for "persons employed in administrative, executive, or professional capacities." Pet. App. 4. FIE asserted as its Fourth Affirmative Defense that its Personal Lines claims representatives were "administrative" employees within the meaning of this Wage Order and therefore not entitled to the protections of California overtime law. After the parties filed cross-motions concerning the validity of FIE's defense, the trial court granted summary adjudication to respondent claims representatives, holding that they were not exempt under California law and that FIE was therefore

required to pay them statutory overtime premiums under Labor Code §1194. The California Court of Appeal affirmed this summary adjudication ruling in the course of deciding FIE's later interlocutory appeal from an order awarding interim attorney's fees to respondents' counsel. FIE's Petition for Certiorari seeks this Court's review of the limited portion of the California Court of Appeal's interlocutory interim fee decision that addresses the administrative employee exemption to state overtime law.

2. Facts.

FIE is an insurance company whose principal corporate function is insurance claims handling. FIE "contracts out" to an affiliated company, Farmers Group, Inc., all non-claims matters (such as sales and marketing, product development/pricing, financial oversight and investment management, human resources and payroll, and underwriting). In addition to processing claims arising from its own insurance policies, FIE also processes claims for affiliated insurance companies, which compensate FIE for this service. Bell I RT 30:22-31:7, 32:8-33:13; Bell I RA at 2598-2602, 2606-12, 2614-29, 2632-33, 2639-42, 2723-27.[1]

FIE's "Personal Lines" division processes indemnification claims arising under FIE's automobile and homeowners insurance policies sold to private individuals. Such claims include automobile damage and theft, residential building damage and contents damage or loss, and third-party automobile injuries. The homeowners' building and damage

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[1] Citations to the Appellant's Appendix (AA), Respondents' Appendix (RA), and Reporters Transcript (RT) in *Bell I* are to the record in FIE's prior interlocutory appeal to the California Court of Appeal in this case—*Bell v. Farmers Insurance Exchange*, No. A090005. FIE incorporated that record by reference into the record for the subsequent interlocutory appeal (No. A091134) on which FIE's Petition for Certiorari is predicated.

claims each average about $3,000; automobile damage claims average about $2,100; and bodily injury claims (other than the roughly 1% that are underinsured motorist claims) average $6,900. Bell I RA at 2363, 2374, 2384, 2764, 2798, 2808, 2852-52.

Respondent claims representatives, who comprise about one-third of FIE's total workforce, estimate and process Personal Lines claims. Their responsibilities, discretion, and autonomy are sharply limited by FIE. FIE's Personal Lines claims representatives do not have their own personal offices, or even cubicles, but are grouped together in large rooms at assigned desks in the Branch Claims Offices. When drafting correspondence, they are required to use standard form letters. Likewise, they must use a standardized, scripted voicemail greeting. FIE requires its claims representatives to make initial contact with claimants on the day a claim is filed, and FIE monitors their voice mailboxes to confirm that they return calls expeditiously. Bell I RA at 2392, 2563, 2717, 2819-20, 2899, 2919, 4441, 4445, 4541-42.

FIE's starting salaries for its claims representatives were recently as low as $26,000. Bell I RA at 2373-4, 2383-4. Turnover rates for claims representatives have been high; approximately 2,400 individuals have held approximately 830 Personal Lines claims representative positions since October 1, 1993. Bell I RT 61:14-17. When work levels increase beyond the capacity of the workforce to handle, the Branch Claims Offices hire "temps" to fill those Personal Lines claims representative positions. Bell I RA at 2374, 2385.

FIE's claims operation is overseen by a steep hierarchy, of which respondent claims representatives lie at the bottom rung. Top management is stationed at FIE's Home Office in Los Angeles, California, to which its three California Regional Offices report. The Personal Lines claims representatives, who are spread among FIE's approximately 70

Branch Claims Offices, report to Branch Claims Supervisors, who in turn report to Branch Claims Managers, who in turn report to one of FIE's Regional Offices, where several layers of claims overseers are employed. *See* record citations *infra*, at 6 n. 2.

FIE imposes strict control over its Personal Lines claims representatives' claims-handling functions, as shown by the detailed level of instruction and lack of discretion in the FIE "Claims Representative Field Manual." Bell I RA at 2416-18, 2442, 2454-57, 2460-62, 2717, 2898-2969. The Forward to FIE's Manual makes clear that FIE's claims representatives are not allowed to handle any matters of "importance":

> We have made the deliberate decision to vest the responsibility for our operations upon the Branch and Regional Claims Managers, and it is necessary that these officials accept this in its full sense. Again, *the actual handling of the routine and unimportant may be delegated, but questions of importance must be decided by the Branch Claims Manager, and at a higher level by the Regional Claims Manager.* [Bell I RA at 4049 (emphasis supplied)].

For example, instead of giving its Personal Lines claims representatives discretion in settling claims, FIE requires them to use standard estimating software to determine automobile and residential repair costs and market values for stolen and "total loss" damaged automobiles. With respect to homeowners' claims for contents damage or theft, FIE has a strict policy of paying the lowest price for a comparable item; and requires its claims representatives to inventory all claims for items whose value is $50 or more, using discount catalogs and calling local stores to determine the lowest comparable price. Estimating precision is expected on *all* files, and claims representatives are not permitted to close a file in excess of the "correct" indemnity value. Likewise, each

third-party bodily injury claim is considered to have a correct settlement range, based primarily on documented medical costs and lost work time. Bell I RA at 2375, 2386, 2421-22, 2435-38, 2444-47, 2583-84, 2666-76, 2705-08, 2790-94, 2814, 2837-42, 2923-25, 2953-54.

FIE requires any claim file valued in excess of a claims representative's monetary "file authority" to be reviewed by an FIE employee at one or more higher level, and all complex or unusual files must be submitted to overseers in the Regional Office and/or Home Office.[2] In addition, "reserved" files (property files open more than 30 days and all bodily injury claims open for 10 days) are reviewed by supervisors at regular intervals. *All* bodily injury claim settlements must be approved by a supervisor before the file can be closed. Supervisors also conduct "case reviews" of *all* open files, regardless of their value, on a monthly or more frequent basis. Moreover, FIE's claims overseers conduct FIE's "Quality Assurance Program," periodically auditing closed claim files for procedural compliance and claim "overpayments." Bell I RA at 2375-78, 2385-88, 2364-67, 2425-33, 2809-10, 2903, 2907, 2923, 3407-13, 3420, 3933-34. While coverage disputes are rare, they consume little time when they occur, and the role of the claims representatives with respect to those disputes is limited to fact-gathering. All decisions whether to provide or deny coverage are made at the Branch Claims Manager level or higher. Bell I AA at 1137, 1140, 1142; Bell I RA at 2368, 2378-79, 2389, 2688-89, 2693, 2718-20, 2779-81, 2904, 2932, 3369-70, 3637.

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[2] Bell I RA at 2433-34, 2444, 2561, 2571, 2710-13, 2777-78, 2782, 2799-2800, 2831-33, 2847, 2852-53, 4047-55, 4062-76, 4105, 4200-03, 4232, 4235, 4237, 4244, 4299-4300. The class members' "file authority" ranges between $500 and $15,000; most claims representatives have less than $5,000 authority. Bell I RA at 2413, 2694-2701, 4464-72.

In short, other FIE officials, at a much higher level in the company than respondent claims representatives, "administer" FIE's business. Claims policies and procedures are set by top level management at FIE's Home Office. All other decisions regarding how FIE's claim-handling business should be run (aptly denoted "claims administration" by FIE) are likewise made by persons other than the low-level Personal Lines claims representatives (including purchasing, budgeting, monitoring the adequacy of claims-handling staffing levels, and management of claims office facilities and equipment). Bell I RA at 2454-57, 2576-77, 2657-58, 2785-86, 2813, 2831-33, 2847, 2854-57, 2860-62. As the Court of Appeal stated, "the bulk of [the claim representatives'] time is involved in 'investigating and estimating claims, communicating with policy holders and third party claimants about the indemnity value of the claim, filling out numerous forms, performing various other clerical work, such as photocopying and matching mail to files, and with respect to field claims representatives, driving.'" Pet.App. 32 (quoting from Plaintiffs' Statement of Undisputed Facts).

3. The Decision Below.

The trial court granted summary adjudication to respondent claims representatives on FIE's Fourth Affirmative Defense, which alleged that FIE's Personal Lines claims representatives were exempt under the "administrative" exemption to the overtime requirements of the version of IWC Wage Order 4 then in effect. The claims representatives then moved for an interim award of attorney's fees under California Labor Code §1194, having prevailed on this threshold liability issue. The trial court granted plaintiffs' fee motion, and FIE took an interlocutory appeal to the California Court of Appeal, arguing that: 1) the trial court had erred in granting summary adjudication to the claims representatives in the first place; and 2) even if summary adjudication had been properly

granted, the claims representatives were not entitled to interim fees under California law.

Although the Court of Appeal ultimately *reversed* the interim fee award on the ground that interim fees are not available under California Labor Code §1194 (Pet.App. 38-46), it *affirmed* the trial court's threshold ruling that FIE's Personal Lines claims representatives were not exempt "administrative" employees under state law. Based on its careful "analysis of the peculiar nature of FIE's business and the claims representatives' role in that business" (Pet.App. 37-38), the Court of Appeal concluded that respondents "perform[] the day-to-day activities" of FIE's claims processing business—its only business. *Id.* at 27-28, 32. They "have no formal advisory role in setting FIE's overall claims handling policy and procedures or in managing FIE's business infrastructure . . . ." *Id.* at 29. Instead, "the claims representatives in the personal lines division are ordinarily occupied in the routine of processing a large number of small claims, . . . [and their] authority to settle claims is set at a low level that reflects the small size of most claims." *Id.* at 35-36. "[T]he record as a whole [thus] confirms the accuracy of FIE's own description of the claim representatives' responsibilities as being restricted to 'the routine and unimportant.'" *Id.* at 36.

Like the trial court, the Court of Appeal concluded that the "administrative" exemption should be limited to employees who actually perform administrative work rather than "production" work, and that on the undisputed facts before it, respondent claims representatives fell "clearly outside the category of administrative workers." Pet.App.37. The Court of Appeal thus noted that claims handling was a product that FIE provides for its individual and corporate clients:

> We find it particularly significant that FIE performs a substantial amount of claims handling work for other related companies within the Farmers Insurance Group

> of Companies and is reimbursed for the costs of these services. [Pet.App. 29.]

And, it further noted that FIE's Personal Lines claims representatives' job was to conduct the day-to-day production task of processing those claims:

> Claims arising in California from these policies, as well as from similar policies issued by other affiliated companies, are normally processed by claims representatives working in some 70 branch claims offices in the state. Employees in these branch claims offices, including clerical and supervisory employees as well as claims representatives, constitute the majority of FIE's workforce in California.
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> * * *
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> The undisputed evidence establishes that claims adjusting is the sole mission of the 70 branch claims offices where the plaintiffs worked. The claims representatives are fully engaged in performing the day-to-day activities of that important component of the business. [Pet.App. 2, 32.]

Accordingly, because the undisputed facts established that FIE's claims representatives are engaged in production work, the Court of Appeal held that these claims representatives do not fall within the administrative exemption from the overtime requirements of Wage Order 4.

Although FIE was the prevailing party before the Court of Appeal (because it successfully obtained reversal of the interim fee award), FIE sought review in the California Supreme Court of the portion of the Court of Appeal's opinion that affirmed the summary adjudication order. The California Supreme Court denied review, and FIE has now filed a Petition for Certiorari to this Court. During the pendency of these interlocutory appellate proceedings, the case proceeded to trial in the Alameda County Superior

Court. In June 2001, the jury returned a verdict against FIE, which recently filed a Notice of Intention to Move for New Trial or, Alternatively, for Judgment Notwithstanding the Verdict.

REASONS FOR DENYING THE WRIT

FIE's Petition seeks review of two narrow questions, neither of which was decided by the California Court of Appeal, regarding the proper application of the Fair Labor Standards Act exemption for workers "employed in a bona fide . . . administrative . . . capacity." 29 U.S.C. §213(a)(1). It would be difficult to imagine a less suitable vehicle than this case for resolving those federal law FLSA questions, however, because the California Court of Appeal's interlocutory ruling rests entirely upon *state* overtime law, not the FLSA. To be sure, the Court of Appeal referred to certain federal precedents in its decision, but it explicitly did so only for "insights" that might be useful in construing state law, while emphasizing that state and federal overtime law are not identical. Moreover, the California Court of Appeal's opinion does not discuss, even as a matter of state law, either of the questions the petitioner asks this Court to decide—questions not fairly raised by the facts of this case. To the contrary, the decision below merely applies the general distinction between "administrative" and "production" employees to the facts of a particular case involving an employer with a "peculiar" business. Pet.App. 37. The Petition should be denied.

1. FIE's Petition does not present a substantial federal question. Respondents brought their overtime claims under state law only. Pet.App. 2. Although FIE contends that a federal question is presented because "federal regulations are incorporated into Wage Order 4" (Pet. at 7), that is not how the Court of Appeal analyzed this case, and the version of Wage Order 4 quoted in the Petition is not the version of

Wage Order 4 applicable to this case. As FIE itself acknowledged below, "Wage Order 4 was revised comprehensively" during the pendency of its state court appeal. Pet.App. 16-17. The former version of Wage Order 4 does not contain the express reference to federal regulations upon which FIE now relies. *Compare* Petition at 6-7 & Pet.App. 84 *with* Res. App.[3] Moreover, although California law includes an exemption for "administrative" employees, that state law administrative exemption is *not* identical to the federal law administrative exemption, as the California Supreme Court has held in another case (*Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 797 (1999) (distinguishing between the federal law "primary duty" test and the state law 50% of the workday test)), and as the California Court of Appeal reaffirmed in this case.

FIE is correct that the Court of Appeal's decision includes a discussion of federal regulations and cases construing the FLSA. However, in addressing those authorities, the Court of Appeal explicitly stated that it was examining federal precedents only for the "insights" they might provide about the meaning of "administrative capacities" (Pet.App. 22), not because state and federal overtime law are identical or because state law incorporates federal law on this issue.

Even where a state court decision cites federal precedents, no federal issue is raised where, as here, the state court states that it is referring to federal authority for advisory purposes only, rather than because those authorities are controlling. To

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[3] Indeed, FIE's principal argument to the California Court of Appeal was that the trial court had erred in considering federal law principles at all, because the prior wage order that governed this case did *not* incorporate the distinction set forth in the federal FLSA regulations between non-exempt production employees and exempt administrative employees. *See* Appellant's Opening Court of Appeal Brief in No. A091134 at 10-27; Appellant's Reply Court of Appeal Brief in No. A091134 at 2-7.

avoid creating a federal law issue, the state court "need only make clear by a plain statement in its judgment or opinion that the federal cases are being looked to only for purposes of guidance, and do not themselves compel the result the court reached." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). That is precisely what the Court of Appeal did in this case.

The California Court of Appeal's decision explicitly states that it is looking to federal law only for "insights and a general methodology":

> We wish to make clear that *we do not perceive a degree of parallelism between federal and state law that would make the entire corpus of federal regulations construing the administrative exemption directly applicable* to the exemption provision of wage order No. 4. *We look to federal law only for insights and a general methodology* in construing the term "administrative capacities." [Pet.App. 22 (emphasis added).]

That statement, particularly when read in conjunction with the other language disavowing any intent to be bound by federal authorities, constitutes a "plain statement" that this case was decided under state law only and does not raise any federal question—substantial or otherwise. *See also* Pet.App. 16 (stating that the court is not "approving any theory of implied 'adoption' by reference to the federal regulations"); Pet.App. 17 (refusing to express any opinion as to the significance of the post-October 1, 2001 changes in the language of Wage Order 4); Pet.App. 35 (noting that the court's analysis must proceed "[i]n the absence of detailed interpretive regulations comparable to those in federal cases"). While FIE cites *Three Affiliated Tribes v. Wold Eng.*, 467 U.S. 138 (1984), this is neither a case in which the California courts "construe[d] state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements . . . [or] broadly in the belief that federal law poses no barrier to the exercise of state authority." *Id.* at 152.

2. The two questions presented for review by the Petition for Certiorari are neither discussed in the California Court of Appeal's opinion nor implicated by the facts of this case.

a. The Court of Appeal did not, as FIE claims, hold that courts deciding whether workers are "administrative" employees (as opposed to "production" employees) should consider only "the character of the internal department where employees work" rather than "the nature of an employer's business as whole." Petition at i. Rather, the California court determined, based on the undisputed facts of record, that claims adjusting was *one of the important components* of FIE's business, and that the Personal Lines claims representatives are best characterized as "production" workers because they provide this important claims adjusting service to customers.

The Court of Appeal began with the obviously correct premise that a business may provide more than one product or service:

> We find the analysis in *Reich v. Chicago Title Ins. Co.* (D.Kan. 1994) 853 F.Supp. 1325 to be especially instructive. The court examined the duties of the plaintiff escrow closers "to determine whether they carry out Chicago Title's day-to-day operations. . . or whether they administer the business affairs. . . [of the company]." Finding that escrow closers were engaged in day-to-day operations, the court stated, "Chicago Title is in the escrow closing business, and its . . . status as a title insurer does not alter the fact that escrow closings are a very real product. . ., which it markets and sells separate from . . . its overall title insurance operations." (*Id.* at p. 1330, fn. omitted.*)* [Pet.App. 27.]

The Court of Appeal then concluded that, however broadly FIE's business is defined, claims adjusting is one of the main products or services that petitioner supplies to its customers,

and is, moreover, the work that respondent Personal Lines claims representatives perform:

> We find it particularly significant that FIE performs a substantial amount of claims handling work for other related companies within the Farmers Insurance Group of Companies and is reimbursed for the costs of these services.
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> * * *
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> The undisputed evidence establishes that claims adjusting is the sole mission of the 70 branch claims offices where the plaintiffs worked. The claims representatives are fully engaged in performing the day-to-day activities *of that important component* of the business. [Pet.App. 29, 32 (emphasis supplied).]

Because of "the peculiar nature of FIE's business" (Pet.App. 37), the classification of FIE's representatives as production workers was not even considered a close call by the California Court of Appeal. Their "role in the business organization places them *clearly* outside the category of administrative workers." *Id.* (emphasis supplied):

> First, it is undisputed that FIE does not carry out the sales activities ordinarily involved in operating an insurance business. . . . Secondly, as a reciprocal insurance exchange, FIE is managed by a related company . . . , known as the attorney-in-fact, which performs activities that would normally be included within the executive and administrative functions of a corporation. . . . The plaintiffs maintain that, in the absence of ordinary sales or managerial functions, "[t]he sole function of FIE's operation is handling claims arising under insurance policies." The statement is well documented by testimony of FIE managers and executives. For example, Thomas Norman stated unequivocally, "The Farmers Insurance Exchange does not do anything other than the claims function. . . ." [Pet.App. 28-29.]

Whether as a general principle a court should consider the business of a whole company or a single department in determining whether particular employees are production workers is therefore neither an issue raised by the facts of this case nor decided by the California Court of Appeal.

Likewise, although FIE claims to have identified two conflicting lines of federal authority on its separate department/whole company issue (Pet. at 11-12), none of the cases FIE cites contain any discussion of the issue at all. Those cases simply apply the administrative employee/production employee distinction to different factual contexts. For example, although FIE contends that *Webster v. Public School Employees of Washington, Inc.*, 237 F.3d 910 (9th Cir. 2001), creates an appellate conflict, there is no discussion in that case of any separate department/whole company distinction. Nor would such a discussion have affected the Ninth Circuit's analysis. The issue in *Webster* was simply whether plaintiff union field representative was engaged in administering the affairs of the bargaining unit the union represented (which the Ninth Circuit analogized to the union's "customers"), not whether the field representative was engaged in administering the affairs of the union itself.

b. The second question presented by the Petition for Certiorari is "whether courts should treat routine duties associated with exempt functions as being exempt functions in determining whether overtime must be paid." Petition at i. The California Court of Appeal's opinion, however, contains no generally-applicable holding about how to classify routine work "associated" with administrative work. The Court of Appeal had no need to reach this issue, because of its conclusion about the Personal Lines claims representatives' role in the company's business:

> In short, the record as a whole confirms the accuracy of FIE's own description of the claim representatives' responsibilities as being restricted to "the routine and

> unimportant." On matters of relatively greater importance, they are engaged only in conveying information to their supervisors—again primarily a "routine and unimportant" role. This characterization of their role in the company places the plaintiffs in the sphere of rank and file production workers. More precisely stated, the plaintiffs render a service within an important component of the FIE business organization, i.e., the branch claims offices, which this component of the organization exists to produce. Following federal precedents, we hold that this characterization of the plaintiffs' role in the business organization places them clearly outside the category of administrative workers. [Pet.App. 36-37.]

Before this Court could possibly reach FIE's argument that the California Court of Appeal erred in classifying "associated" routine work, it would first have to accept FIE's premise that the Court of Appeal erred in its understanding of the facts. According to FIE, the Court of Appeal failed to understand that because Personal Lines claims representatives make "recommendations," they must be regarded as "advising the management"—a function that FIE characterizes as constituting exempt "administrative" work. Pet. at 15. FIE then reasons that the routine day-to-day work that actually consumes the vast bulk of the claims representatives' time—which FIE itself describes as "legwork"—is necessarily "associated" with the so-called administrative work of advising management. Pet. at 15-16. From that last assertion, FIE derives its ultimate assertion that the Court of Appeal must have been wrong in concluding that its Personal Lines claims representatives were not exempt "administrators," because all time spent by those employees on routine tasks should have been deemed "associated" with the "exempt administrative" work of "advising management."

There are many flaws in this interlinked series of premises, beginning with the first premise about the significance of the Personal Lines claims representatives' "recommendations." That an employee sometimes makes "recommendations" does

not mean that the employee is necessarily engaged in "advising management" about important matters regarding the administration of the company, and therefore performing administrative work. Otherwise a file clerk's suggestion to her supervisor about which cabinet to store file folders in would be deemed an exempt "administrative" activity and, because the suggestion pertained to her routine filing work, all of that routine work would be treated as administrative work.

In this case, the Court of Appeal properly concluded that "recommendations" made by claims representatives are "associated in some manner with the claims adjusting function" of the Personal Lines claims representatives (Pet.App. 32), not with the management of FIE's business, and that the claims representatives' communications with management are more accurately described as "conveying information to . . . supervisors" about the adjustment of claims (Pet.App. 36) than as "advising the management" in any exempt administrative sense. The Court of Appeal further concluded that to the extent the claims representatives' "additional duties extend beyond the core tasks of claims adjusting, they involve intermittent and incidental tasks that involve a small part of the claims representatives' time (*e.g.* coverage issues, attendance at . . . settlement conferences)" and are therefore not "administrative" tasks at all. Pet.App. 32.

Given the fact-bound conclusions reached by the California Court of Appeal, this Court could not even reach FIE's second question—let alone decide that question in FIE's favor—without first delving into the specific details of the Personal Lines claims representatives' work duties, and then resolving the evidence differently than the California trial and appellate courts resolved it. Only if this Court reached a different factual conclusion concerning the nature of respondents' daily job functions would it be in a position

even to consider FIE's question regarding the proper classification of "associated" routine work. The California Court of Appeal itself never addressed the question that FIE raises because it was not presented on the facts as the Court of Appeal understood them. This Court should not address that question either.[4]

3. Finally, although the petition asserts that "millions of American workers" will be affected by the lower court's decision if review is not granted (Pet. at 5), the fact of the matter is that the decision at issue is by an intermediate state court of appeal ruling on interlocutory review from an interim fee order that applied a state wage order that has since been "revised comprehensively." Pet.App. 16. The state court's decision also involves only the "administrative" exemption to overtime requirements, not the "professional" exemption or the "executive" exemption, under which most overtime class action cases are litigated. And, as to the "administrative" exemption, the case below was not even close. FIE is in the business of processing insurance claims. Its Personal Lines claims representatives, comprising one-third of its workforce, process those claims under strict supervision and tight procedural controls, as comprehensively detailed in the state court record. The Court of Appeal concluded, based on the

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[4] The proper classification of "associated" routine work is also of little moment under *federal* law, because the FLSA test for the "administrative" exemption focuses on the employee's "primary duty," not how the employee spends the majority of his or her time. It is *California* law that imposes a strict, time-based test. *See Ramirez v. Yosemite Water Co.*, 20 Cal.4th at 797. FIE does not even purport to identify a dispute among lower federal courts on the classification of "associated" routine time; instead, it merely suggests that the state law test as applied by the Court of Appeal is inconsistent with a federal regulation. Pet. at 14 (quoting 29 C.F.R. § 541.202(a)). However, states are free to adopt overtime laws that are more protective of workers' rights than the FLSA, and the conflict that FIE claims to have identified is of no legal consequence, particularly in the factual context of this case.

undisputed facts presented on cross-motions for summary adjudication, that FIE's Personal Lines claims representatives' "role in the business organization places them *clearly* outside the category of administrative workers." Pet.App. 37 (emphasis supplied). This case does not warrant Supreme Court review.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

CALIFORNIA CODE OF REGULATIONS

Article 4. Professional, Technical, Clerical, Mechanical, and Similar Occupations

(Order No. 4-98, Effective 1-1-98)

§ 11040. Order Regulating Wages, Hours, and Working Conditions In Professional, Technical, Clerical, Mechanical, and Similar Occupations.

1. Applicability of Order. This Order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis, unless such occupation is performed in an industry covered by an industry order of this Commission, except that:

(A) Provisions of sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $150.00 per month: or

(2) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting, or is engaged in an occupation commonly recognized as a learned or artistic profession; provided, however, that registered nurses shall not be considered to be exempt

professional employees for the purposes of this subsection (2) of this order, unless they individually meet the administrative, executive, or professional criteria described in subsection (A)(l) above.

(B) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

2. Definitions.

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Professional, Technical, Clerical, Mechanical, and Similar Occupations" includes professional, semiprofessional, managerial, supervisorial, laboratory, research, technical, clerical, office work, and mechanical occupations. Said occupations shall include, but not be limited to the following: accountants, agents, appraisers, artists; attendants; audio-visual technicians; bookkeepers, bundlers; billposters; canvassers; carriers; cashiers; checkers; clerks; collectors; communications and sound technicians; compilers; copy holders; copy readers; copy writers; computer programmers and operators; demonstrators and display representatives: dispatchers; distributors; door-keepers; drafters; elevator operators; estimators; editors; graphic arts technicians; guards; guides; hosts; inspectors; installers; instructors; interviewers; investigators; librarians; laboratory workers; machine operators; mechanics; mailers; messengers; medical and dental technicians and technologists; models; nurses;

packagers; photographers; porters and cleaners; process servers; printers; proof readers; salespersons and sales agents; secretaries; sign erectors; sign painters; social workers; solicitors; statisticians; stenographers; teachers; telephone, radio-telephone, telegraph and call-out operators; tellers; ticket agents; tracers; typists; vehicle operators; x-ray technicians; their assistants and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations.

(D) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(E) "Employ" means to engage, suffer, or permit to work.

(F) "'Employee" means any person employed by an employer.

(G) "Employer" means any person as defined in section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(H) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so. Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act.

(I) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(J) "Outside Salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of

business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(K) "Primarily" as used in section 1, Applicability, means more than one-half the employee's work time. Within the health care industry, the term "primarily" as used in section 1, Applicability, means (1) more than one half the employee's work time as a rule of thumb or, (2) if the employee does not spend over 50 percent of the employee's time performing exempt duties, where other pertinent factors support the conclusion that management, managerial, and/or administrative duties represent the employee's primary duty. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, the employee's relative freedom from supervision, and the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

(L) "split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(M) "Teaching" means, for the purpose of section 1 of this Order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(N) "Wages" (See California Labor Code, section 200)

(O) "Workday" means any consecutive 24 hours beginning at the same time each calendar day.

(P) "Workweek" means any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. Hours and Days of Work.

(A) No employee eighteen (18) years of age or over shall be employed more than forty (40) hours in any workweek unless the employee receives one and one-half (1 l/2) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. No overtime pay shall be required for hours of work in excess of any daily number.

(B) Provisions of subsection (A) above shall not apply to any employee whose earnings exceed one and one-half (1 1/2) times the minimum wage if more than half (1/2) of that employee's compensation represents commissions.

(C) One and one-half (1 1/2) times a minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek except that minors sixteen (16) and seventeen (17) years old who are not required by law to attend school and may therefore be employed for the same hours as an adult are subject to subsection (A) above.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $500 to $10,000 as well as to criminal penalties provided herein. Refer to California Labor Code sections 1285 to 1311 and 1390 to 1398 for additional restrictions on the employment of minors.)

(D) if a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food or drink or for heating food or drink; and a suitable sheltered place shall be provided in which to consume such food or drink.

(E) Except as provided in subsections (C), (D), and (G), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

(F) The provisions of this section are not applicable to employees whose hours of service are regulated by

(1) the United States Department of Transportation Code of Federal Regulations, title 49, sections 395.1 to 395.13, Hours of Service of Drivers, or

(2) Title 13 of the California Code of Regulations, subchapter 6.5, section 1200 and following sections, regulating hours of drivers.

(G) No employee shall be terminated or otherwise disciplined for refusing to work more than 72 hours in any workweek, except in an emergency as defined in section 2(D).

(H) When an employee in the health care industry requests in writing, and the employer concurs, the employee shall be permitted to make up work time lost as result of personal obligations. The amount of make up time shall not exceed two (2) hours in any one workweek and must be made up during that workweek. With the exception of the make up time authorized in this subsection, the appropriate overtime provisions in section 3 shall apply to all other excess weekly hours worked in the workweek.

4. Minimum Wages.

(A) Every employer shall pay to each employee wages not less than four dollars and seventy-five cents ($4.75) per hour for all hours worked, effective October 1, 1996; not less than five dollars ($5.00) per hour for all hours worked, effective March 1, 1997; not less than five dollars and fifteen cents ($5.15) per hour for all hours worked, effective September 1, 1997; and not less than five dollars and seventy-five cents ($5.75) per hour for all hours worked, effective March 1, 1998, except:

(1) LEARNERS. Employees 18 years of age or over, during their first one hundred and sixty (160) hours of

employment in occupations in which they have no previous similar or related experience, may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel.

(2) MINORS may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel, provided that the number of minors employed at said lesser rate shall not exceed twenty-five percent (25%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ three (3) minors at said lesser rate. The twenty-five percent (25%) limitation on the employment of minors shall not apply during school vacations.

Note: Under certain conditions, the full minimum wage may be required for minors. See Labor Code section 1391.2(b).

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. Reporting Time Pay.

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled

day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. Licenses for Handicapped Workers. A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(*See* California Labor Code, sections 1191 and 1191.5.)

7. Records.

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birthdate, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hour worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing

(1) all deductions;

(2) the inclusive dates of the period for which the employee is paid;

(3) the name of the employee or the employee's social security number; and

(4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. Cash Shortage and Breakage. No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee.

9. Uniforms and Equipment.

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

Note: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

Note: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to section 400 and following of the Labor Code, or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. Meals and Lodging.

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(B) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement

between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

	Effective January 1, 1998	*Effective March 1, 1998*
Room occupied alone	$24.25 per week	$27.05 per week
Room shared	$20.00 per week	$22.30 per week
Apartment—two-thirds (2/3) of the ordinary rental value, and in no event more than	$290.80 per month	$324.70 per month
Where a couple are both employed by the employer, two-thirds (2/3) of the ordinary rental value, and in no event more than	$430.20 per month	$480.30 per month
Meals:		
Breakfast	$1.80	$2.05
Lunch	$2.55	$2.85
Dinner	$3.40	$3.80

(C) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor lodging not used.

(D) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. Meal Periods.

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work

period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

(B) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

(C) Notwithstanding any other provision of this order, employees who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employe. at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

12. Rest Periods. Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

13. Change Rooms and Resting Facilities.

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean and sanitary.

Note: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. Seats.

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. Temperature.

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce

such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. Elevators. Adequate elevators, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

17. Exemptions. If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in section 7, Records; section 11, Meal Periods; section 12, Rest Periods; section 13, Change Rooms and Resting Facilities; section 14, Seats; section 15. Temperature; or section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

18. Filing Reports. (*See* California Labor Code, section 1174(a))

19. Inspection. (*See* California Labor Code, section 1174)

20. Penalties. (*See* California Labor Code, section 1199)

21. Separability. If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. Posting of Order. Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the work day. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this Order and make it available to every employee upon request.

Note: Authority cited: Section 1173, Labor Code; and California Constitution, Article XIV, Section 1. Reference: Sections 1182 and 1184, Labor Code.

(3)

Supreme Court, U.S.
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No. 01-485

IN THE
Supreme Court of the United States

FARMERS INSURANCE EXCHANGE,
Petitioner,

v.

ROSE M. BELL, LOREN D. MITCHELL, RACHEL POESCHEL, WYNN ANDERSON AND JOSEPH C. KOKAISL, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeal Of California,
First Appellate District

BRIEF *AMICI CURIAE* OF THE AMERICAN INSURANCE ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES, AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This brief addresses the first question presented by the petition, whether courts should consider the nature of an employer's business (or that of its customers) as a whole, rather than the character of the internal department where employees work, in deciding whether the employees are production workers entitled to overtime pay under the principles embodied in the Fair Labor Standards Act.

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BRIEF *AMICI CURIAE* OF THE AMERICAN INSURANCE ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES, AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

The American Insurance Association, the Chamber of Commerce of the United States, and the California Chamber of Commerce respectfully submit this *amici curiae* brief in support of the petition for a writ of certiorari in this case.[1] *Amici* support the petition, and offer their views in particular with regard to the first question presented – the proper scope of inquiry in assessing whether an employee is a production worker entitled to overtime or an administrative worker exempt from overtime requirements under federal and California law.

INTEREST OF *AMICI CURIAE*

Amicus American Insurance Association's 370 insurers write more than $76 billion in premiums each year, including over $10 billion in California. AIA member-companies offer all types of property and casualty insurance including personal and commercial auto insurance, commercial property and liability coverage for small businesses, workers' compensation, homeowners' insur-

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[1] Pursuant to this Court's Rule 37.2, the written consent of the parties to the filing of this brief is being lodged herewith. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

ance, medical malpractice coverage, and product liability insurance.

AIA member-companies employ many claims adjusters, in California and throughout the United States. The importance of the decision below to AIA and to its members cannot be overstated – the Court of Appeal's incorrect application of an essential component of the federal and state wage-and-hour regulatory regimes could result in significant and unjustified costs to insurance companies as well as inconvenience and inflexibility for claims adjusters and other administrators who should properly be exempt from the rigid structure imposed upon lower-level laborers viewed by the law as unable to protect themselves.

Amicus Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation, representing an underlying membership of nearly three million businesses and organizations of every size and in every industry sector and geographical region of the country, including a significant number of members in California. A principal function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community. This case presents such vital issues for countless American employers.

Amicus California Chamber of Commerce (the "California Chamber") is a voluntary, non-profit California-wide business association with more than 11,000 members, both individual and corporate, who represent virtually every economic interest in the state. Ninety percent of the California Chamber's members are small or medium sized businesses which it represents before the Legislature, local governing bodies, and the courts on a broad range of issues affecting business.

All of the California Chamber's members are exposed to the risk of lawsuits brought by current and former employees based on various wage-and-hour theories such as the one presented by the plaintiffs in this case. As part of its services to employers in the state, the California Chamber has frequently participated as *amicus curie* in major employment-related cases, including *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000), *Turner v. Anheuser-Busch*, 7 Cal. 4th 1238 (1994), *Rojo v. Kliger*, 52 Cal. 3d 65 (1990), *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973 (1989), *Dyna-Med, Inc. v. Fair Employment & Housing Commission*, 43 Cal. 3d 1379 (1987), and *Commodore Home Systems, Inc. v. Superior Court*, 32 Cal. 3d 211 (1982).

In this case, the Court of Appeal decided a question of critical importance to the California and U.S. Chambers, effectively eviscerating the administrative exemption to the federal and California wage-and-hour laws. The court's decision has been publicized throughout the California employment bar, and it will spawn massive litigation and create significant, unexpected costs unless this Court corrects the California court's misinterpretation of federal law on this issue. As representatives of the employers who might be unfairly held liable for overtime pay to employees who properly should be classified as exempt administrators, the California and U.S. Chambers have a substantial interest in this matter.

STATEMENT

The Court of Appeal held that insurance claims adjusters do not qualify for the "administrative" exemption to state overtime requirements because they are production employees who produce the "product" (*i.e.*, claims adjusting services) of the branch claims offices in which they are employed. That decision is premised on a fundamental misunderstanding of the applicable legal prin-

ciples, conflicts with settled precedent, and creates widespread uncertainty and confusion in the law governing wage-and-hour claims.

The Court of Appeal purported to follow the federal Fair Labor Standards Act (the "FLSA") in construing California law on the question whether insurance claims adjusters are "administrative" employees and are therefore exempt from payment of overtime compensation under the California wage-and-hour laws. Unfortunately, however, the court's analysis of federal law rests upon glaring and troublesome errors that, unless corrected, will have a devastating ripple effect far beyond the contours of this case.

Amici will examine one of the Court of Appeal's principal errors that is of significance not only in this case but in many others – the lower court's failure to apply properly the so-called "administrative/production worker dichotomy," described in detail below. In particular, in its analysis of this dichotomy under applicable FLSA precedents, the Court of Appeal looked solely to the role of the employees' duties in relationship to the particular business unit (*i.e.*, the branch claims offices) for which they worked, as opposed to the business enterprise as a whole. That approach has been expressly rejected by the federal case law interpreting the FLSA upon which the Court of Appeal relied. Contrary to the Court of Appeal's misconception, that case law makes clear that the administrative/production worker dichotomy must be analyzed by reference to the employer's business *as a whole*, not by examining the employee's particular business unit in isolation.

ARGUMENT

I. This Court Has Jurisdiction To Review The California Court Of Appeal's Erroneous Interpretation Of Federal Law

This Court has jurisdiction to review the judgment below because the California Court of Appeal predicated its interpretation of state law on its erroneous view of a critical federal doctrine that has been incorporated wholesale into state wage-and-hour regulations.

Both the FLSA, 29 U.S.C. § 201 *et seq.*, and California Industrial Welfare Commission Wage Order No. 4 require, among other things, that employers compensate certain employees at an overtime rate for hours worked over 40 in a particular workweek. The federal and state regulatory regimes exempt from their operation employees classified as administrators, executives or professionals, allowing employees in those exempt categories greater flexibility with regard to their compensation and hours of work. 29 U.S.C. § 213; Wage Order No. 4 at 1(A)(2) (Pet. App. 83-84).

California relies heavily on federal interpretations for guidance as to a number of issues under its wage orders, including the scope of the exemption for employees classified as administrators. Pet. App. 13. After examining the regulatory history of the Industrial Welfare Commission's wage orders, California case law, and applicable opinion letters of the California Division of Labor Standards Enforcement (one of which expressly adopts federal standards for the administrative exemption), the Court of Appeal concluded that "federal authorities are relevant to interpretation of the term 'administrative capacity' [as it is used in Wage Order No. 4]." *Id.* at. 16

In particular, the Court of Appeal found that the prior version of Wage Order No. 4 (which governs the respondents' claims) implicitly incorporated the so-called "administrative/production worker dichotomy," a federal law doctrine discussed in detail below. *Id.* at 22.[2] The Court of Appeal noted that the doctrine arises from the "authoritative interpretation" of the federal courts concerning the statutory term "administrative," a term "that appears in a closely parallel context" in Wage Order No. 4. *Id.* at 23. Indeed, the Court of Appeal relied exclusively on federal case law in its discussion of the administrative/production worker dichotomy, noting in its holding that it was "[f]ollowing federal precedents." *Id.* at 37. Thus, the Court of Appeal's decision with regard to this doctrine was inextricably intertwined with and directly controlled by its view of federal law.

This Court, of course, may not revise a state court's interpretation of state law, but this Court "retains a role

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[2] The current version of Wage Order No. 4 expressly incorporates the federal language from which the administrative/production dichotomy is derived. *Compare* Wage Order No. 4-2001 at 1(A)(2)(a)(i) (Pet. App. 83) (defining an administrative exempt employee as one "[w]hose duties and responsibilities involve . . . *[t]he performance of office or nonmanual work directly related to management policies or general business operations of his/her employer or his/her employer's customers*") (emphasis added) *with* 29 C.F.R. 541.2(a)(1) (Pet App. 56) (defining an administrative exempt employee as one "[w]hose primary duty consists of . . . *[t]he performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers*") (emphasis added). Thus, the question of federal law at issue in this case has continuing importance in the administration of California's regulatory scheme (as well as the application of the FLSA in California and throughout the United States).

when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984); *accord Ohio v. Reiner*, 121 S. Ct. 1252, 1254 (2001); *Hicks v. Feiock*, 485 U.S. 624, 641 (1988); *United Air Lines v. Mahin*, 410 U.S. 623, 630 (1973). "If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes*, 467 U.S. at 152.

This case presents a situation akin to those at issue in *Three Affiliated Tribes* and similar cases: here, the state court's interpretation of state law was based upon its erroneous interpretation of federal precedents that influence and indeed control the resolution of the underlying state law question. Accordingly, the state court examined federal case law and decided a federal issue, and this Court is fully empowered to review the judgment in order to correct the state court's misperception of that threshold federal issue. *Cf. Reiner*, 121 S. Ct. at 1254 (this Court has "jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law").

II. The California Court of Appeal's Interpretation Of The Administrative/Production Worker Dichotomy, Essential To Federal And State Overtime Jurisprudence, Is Fundamentally Flawed

In this case, the Court of Appeal erroneously concluded that insurance claims adjusters employed by Farmers Insurance Exchange ("FIE") were not administrative employees within the meaning of the administra-

tive exemption under Wage Order No. 4. In so doing, the Court of Appeal fundamentally misapplied a critical component of the analysis governing the determination whether an employee qualifies for the administrative exemption under the FLSA – the so-called "administrative/production worker dichotomy."

As the Court of Appeal correctly recognized, under the FLSA, an exempt administrative employee is one who performs "work 'directly related to management policies or general business operations of his employer or his employer's customers.'" Pet. App. 23 (quoting 29 C.F.R. § 541.2). Thus, administrative employees are to be distinguished from "production" employees, who do not perform "work directly related to management policies or general business operations"; rather, they produce the goods or services of the employer. By definition, production employees are not exempt administrative employees.

This dichotomy has been applied by courts not only to traditional production of tangible goods, but also to the production of intangibles. *See Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 23 (1st Cir. 1997) ("non-manufacturing employees can be considered 'production' employees in those instances where their job is to generate (*i.e.*, 'produce') the very product or service *that the employer's business offers to the public*.") (emphasis added).

In this case, the Court of Appeal applied the dichotomy and reached the conclusion that the FIE claims adjusters performed production work, as opposed to "work 'directly related to management policies or general business operations of'" FIE or FIE's customers, because the units of FIE in which they worked – *i.e.*, the branch claims offices in California – were engaged in claims adjusting. Pet. App. 23-33, 37. The court erred, how-

ever, by examining "only . . . the business function *of the branch claims offices* in California where the plaintiffs worked." Pet. App. 31 (emphasis added).

In order for a non-manufacturing employee to qualify as a production worker, he or she must produce "the very product or service that *the employer's business* offers to the public." *John Alden*, 126 F.3d at 23 (emphasis added). For example, in *Martin v. Cooper Electric Supply Co.*, the Third Circuit held that inside salespersons for an electrical products wholesaler were "production" employees, not exempt administrators, because they produced the product that the business was designed to produce – *i.e.*, they produced wholesale sales. 940 F.2d 896, 903-05 (3d Cir. 1991). Similarly, in *Dalheim v. KDFW-TV*, the Fifth Circuit held that news producers were production employees because they "produced" the news segments that were the television station's product. 918 F.2d 1220, 1230-31 (5th Cir. 1990).

If instead the employee provides services "ancillary to an employer's *principal production activity*," he or she is not a production worker. *Cooper Elec. Supply Co.*, 940 F.2d at 904 (emphasis added). For example, in *John Alden*, the First Circuit held that insurance company marketing representatives were not production employees because they were not "involved in the design or generation of insurance policies, the very product 'that the enterprise exists to produce and market.'" 126 F.3d at 9 (quoting *Dalheim*, 918 F.2d at 1230). Similarly, in *Haywood v. North American Van Lines*, the Seventh Circuit held that a customer service coordinator, whose duties in responding to customer and attorney contacts were similar to those of a claims adjuster, performed functions ancillary to her employer's business of moving household goods. 121 F.3d 1066, 1072 (7th Cir. 1997). The analyses in *John Alden* and *Haywood* were per-

formed based upon an examination of the employee's duties in relation to the entire business operation of the employer. *See John Alden*, 126 F.3d at 10 ("In the instant case, the activities of the marketing representatives are clearly ancillary to John Alden's principal production activity – the creation of insurance policies . . . ."); *Haywood*, 121 F.3d at 1072 n.6 ("We reject Ms. Haywood's suggestion that she is a production rather than an administrative employee. North American's 'product' is moving goods from point A to point B. There is no evidence that Ms. Haywood is involved in producing this good in any way . . . .").

More recently, in *Webster v. Public School Employees*, the Ninth Circuit directly addressed the proper scope of a court's inquiry in relation to the administrative/production dichotomy. 247 F.3d 910 (9th Cir. 2001). The plaintiff, a labor union field representative, argued that he "produced" collective bargaining agreements for the bargaining unit "customer" he was assigned to represent. *Id.* at 915. The court rejected the plaintiff's narrow view of production, holding instead that the plaintiff performed exempt administrative work for his employer's customer (the bargaining unit). *Id.* at 916. The court noted that "[i]f [it] were to accept [the plaintiff's] position . . . then any work – including that of a president or CEO – for a legal entity that addresses primarily management or administrative concerns, such as a corporate holding company, would be production. This would defeat the purpose of the administrative exemption." *Id.*

Thus, the employee's duties must be examined in relation to the purpose of the entire enterprise (either that of his or her employer or that of the employer's customers). *Id.* Any other interpretation would make almost every worker a "production worker," because most

workers would undoubtedly assert that they are productive – *i.e.*, that they generate the work product assigned to be completed by employees in their particular department. The Ninth Circuit rejected such a strained formulation, observing that "[t]he purpose of the dichotomy is to clarify the meaning of 'work directly related to the management policies or general business operations,' not to frustrate the purpose and spirit of the entire exemption." *Id.* at 916; *accord Copas v. East Bay Municipal Util. Dist.*, 61 F. Supp. 2d 1017, 1025-26 (N.D. Cal. 1999) (rejecting the claim of a public relations officer for a water utility that she was a production worker because she produced "written publications that were the 'product' of her department" and holding instead that the public relations officer's services "did not relate to the day-to-day production of the East Bay's water supply or the treatment of wastewater").

These decisions are in accord with the FLSA regulations themselves, which recognize that certain exempt administrators may "produce" services ancillary to an entity's principal production activity and do not thereby become nonexempt production workers. The FLSA regulations expressly provide that:

> The test of 'directly related to management policies or general business operations' is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, *claim agents and adjusters*, wage-rate analysts, tax experts, account executives of advertising agencies, customers' brokers in stock exchange firms, promotion men, and many others.

29 C.F.R. § 541.205(c)(5) (Pet. App. 69-70) (emphasis added).

In sum, while the decision of the Court of Appeal purports to follow federal law, it is in direct conflict with the weight of persuasive federal authority, which rejects the Court of Appeal's flawed method of analysis and recognizes that use of such a method would lead to absurd results. The Court of Appeal's erroneous interpretation of federal law is particularly troubling because the state courts are authorized to entertain overtime actions not only under state wage-and-hour law but also under the FLSA. *See* 29 U.S.C. § 216(b); *see also, e.g.*, *Renna v. County of Fresno*, 78 Cal. App. 4th 1 (2000). Given that the Ninth Circuit is one of the federal courts that have directly addressed this question in a manner inconsistent with the approach taken by the court below (*see Webster*, *supra*), the federal and state appellate courts with jurisdiction over overtime claims brought in California are now in direct conflict over the interpretation of the administrative/production dichotomy. This untenable situation will undoubtedly lead to forum-shopping and inconsistent results in the same State based upon the fortuity of which court system hears the case. This Court's review is essential to resolve this unseemly conflict among the state and federal appellate courts in California.

III. Review Is Warranted Because This Case Raises Issues Of Great Importance To The American Workplace

This case is extremely important for the insurance industry because the erroneous analysis of the Court of Appeal has upset long-settled expectations concerning the proper classification of insurance claims adjusters. These employees have traditionally been treated as salaried exempt administrators, entitled to flexibility with regard to their pay and hours of work. In fact, as noted above, insurance claims adjusters are specifically identi-

fied in a list of exempt administrative employees in the federal regulations. *See* 29 C.F.R. § 541.205(c)(5) (Pet. App. 69-70) ("The test of 'directly related to management policies or general business operations' is also met by . . . *claim agents and adjusters* . . . .") (emphasis added). Accordingly, in an unpublished decision, the Ninth Circuit treated this issue in an appropriately summary manner, noting simply that the applicable federal regulation "specifically identifies 'insurance claims adjuster' as an example of an exempt administrative employee." *Munizza v. State Farm Mut. Auto. Ins. Co.*, No. 95-35794, 1996 WL 711563, at *4, 103 F.3d 139 (9th Cir. Dec. 5, 1996). The Ninth Circuit concluded that there could "be no real question that the activities performed by [the plaintiff, a claims adjuster for State Farm] in his position as Claim Specialist clearly fit within the applicable standards that define an exempt employee's responsibilities." *Id.*

In addition to the unexpected, mammoth financial liability for insurance company employers (and the corresponding windfall for claims adjusters) that will result from upsetting years of prior accepted law, this sudden change presents substantial logistical obstacles. Having viewed claims adjusters as exempt administrators, insurance companies typically have not kept detailed records of the work hours of these employees. As a result, calculation of back overtime pay will require incredible feats of memory, sophisticated mathematical models, and, most likely, a good deal of guesswork, all of which will no doubt produce even more litigation.

This is also an extremely important case for countless other employers and employees outside of the insurance industry. Issues concerning the classification of employees as exempt or non-exempt are critical to the operation of the modern workforce. *See* United States

General Accounting Office, *Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place*, Report to the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives (Sept. 1999) at 2 (noting that "[i]n 1998, between 20 and 27 percent of the full-time U.S. workforce – or 19 to 26 million workers – were executive, administrative or professional employees covered by white-collar exemptions of the FLSA").

The FLSA was enacted in 1938 to provide "protection to those who toil in factory and on farm to obtain a fair day's pay for a fair day's work." Franklin D. Roosevelt, message to Congress, May 24, 1937 (81 Cong. Rec. 4983 (daily ed. May 24, 1937), S. Rep. No. 75-884 at 2 (1937)). It was designed "in a modest way to raise the wages of the most poorly paid workers and to reduce the hours of those most overworked." H.R. Rep. No. 75-1452 at 9 (1937). The Court of Appeal's flawed analysis of this important federal wage-and-hour principle will take the FLSA far afield from those noble purposes, instead producing erroneous results in other cases involving workers who should correctly be classified as exempt administrators and allowing a Depression-era law designed to serve as a shield for the lowest paid workers to be used instead as a sword by well-compensated white-collar administrators. *Cf. Freeman v. National Broadcasting Co., Inc.*, 80 F.3d 78, 86 (2d Cir. 1996). Accordingly, this Court should grant review in this case in order to correct the Court of Appeal's misinterpretation of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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